No. 91-1536

Supreme Court, U.S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1991

IRENE O'CONNELL KRUSE
AND
FREDERICK E. WATSON,
Petitioners,

vs.

COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, WILLIAM A. NEWSOM; JOHN T. RACANELLI, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES AS MEMBERS OF DIVISION ONE OF THE SAID COURT OF APPEAL; SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SONOMA; WINSLOW CHRISTIAN; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; LELAND PARACHINI, STEINBERG, FLINN, MATZGER & MELNICK; DAVID B. FLINN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FREDERICK E. WATSON
1475 N. Broadway
Suite 390
Walnut Creek, CA 94596
(510) 947-0393
Petitioner in Pro Se

FREDERICK E. WATSON
1475 N. Broadway
Suite 390
Walnut Creek, CA 94596
(510) 947-0393
Counsel of Record

QUESTIONS PRESENTED

A. Questions Presented On Mrs. Kruse's Petition

Pulliam v. Allen, 466 U.S. 522 (1984), holds that judicial immunity does not bar recovery of equitable relief against state jurists in §1983 actions. Petitioner Kruse's §1983 complaint alleges the private party defendants conspired with the state jurist defendants to subvert justice; and seeks damages against the private parties, but seeks only equitable relief against the state jurists.

Motions to dismiss, raising the affirmative defenses of Rooker-Feldman and res judicata, were granted and the action dismissed as to all defendants. The Court of Appeals affirmed in an unpublished two sentence Memorandum Decision, "for the reasons stated by the trial judge in her memorandum and orders." The questions presented on Mrs. Kruse's petition are:

1. Whether the Rooker-Feldman doctrine can be applied on the basis of the issues being "inextricably intertwined" in a case where federal law has no controlling bearing upon the decision on the merits to be made in the state court action.

2. Whether an order of the California Supreme Court, denying a petition for discretionary appellate review, is a res judicata decision on the merits of the federal constitutional questions raised in that petition, which order therefore creates a Rooker-Feldman jurisdictional bar to any later §1983 federal court action raising those same federal questions.

3. Even if there was no Rooker-Feldman bar, was the dismissal of the state jurists still proper because they have judicial immunity against equitable relief in a case of this type, and should *Pulliam v. Allen* be reconsidered by this Court and modified to recognize such judicial immunity.

4. Did the dismissal of the private party defendants represent a wrongful refusal by the District Court to exercise §1983 jurisdiction.

4.1 Even if the state jurists are now held to have complete judicial immunity in a case of this type, was the dismissal of the private party defendants still a wrongful refusal by the District

Court to exercise the §1983 jurisdiction required to be exercised under *Dennis v. Sparks*, 449 U.S. 24 (1980).

B. Questions Presented On Attorney Watson's Petition

After dismissing the action, the District Court granted Rule 11 sanctions motions on the basis of weighing conflicting affidavits and documentary evidence, to conclude that some factual allegations of the complaint were false and frivolously made; and imposed sanctions consisting of attorneys fees and costs in an amount in excess of $206,000, despite the Court expressly finding the attorneys fees had been deliberately inflated to unreasonable and excessive amounts, and despite the Court being informed that enforcement of the sanctions award would force counsel into bankruptcy reorganization. The Court of Appeals affirmed the sanctions award in the same Memorandum Decision. The questions presented are:

5. Does it violate due process to first erroneously dismiss the complaint and action, by a dismissal which was contrary to existing law; and then impose Rule 11 sanctions for factual frivolousness of the complaint, based upon the Court weighing conflicting affidavits and documentary evidence, to reach the conclusions that (1) some of the factual allegations of the complaint were false and (2) no competent attorney making proper pre-filing investigation could reasonably have believed those allegations to be well founded in fact.

5.1 If there was such violation of due process, is it cured and are the sanctions retroactively validated, if an appellate court later affirms the dismissal on a different legal ground, by overruling or modifying a prior legal decision and rule of law, which had been relied upon by counsel in filing the complaint.

6. Is a party barred from recovering Rule 11 sanctions consisting of reasonable attorneys fees and costs, if that party has authorized and directed legal counsel to deliberately inflate the same to excessive and unreasonable amounts, and to falsely represent to the Court that the fees and costs are reasonable; and counsel does so inflate the fees, make such false representation and seek such excessive and unreasonable award.

7. Is it a violation of procedural due process for a Court of Appeals to award double costs and attorneys fees under FRAP Rule 38, as sanctions for a frivolous appeal without ever (1) specifying the arguments of error found frivolous, (2) stating the reasons for so finding, and (3) thereafter granting opportunity to file a brief in opposition, before appellate sanctions are imposed, and doing this despite the sanctioned parties having requested a statement of reasons for imposition of appellate sanctions, and opportunity to file a brief in opposition before appellate sanctions were imposed.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Irene O'Connell Kruse and Frederick E. Watson pray that a writ of certiorari issue to review the judgment and Memorandum Decision of the United States Court of Appeals for the Ninth Circuit, filed on October 24, 1991, petition for rehearing of which was denied by the Court of Appeals on December 12, 1991.

OPINIONS BELOW

The unpublished Memorandum Decision of the Court of Appeals, which adopts the opinions and orders of the District Court, appears in Appendix A. The order of the Court of Appeals denying petition for rehearing appears in Appendix B. The unpublished memorandum opinion orders of the District Court, which were filed on August 21, 1989, June 18, 1990, and August 22, 1990, appear in Appendixes C, D, and E, respectively.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 24, 1991, and timely petition for rehearing was denied on December 12, 1991. This petition for certiorari was filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Due Process Clause Of The Fourteenth Amendment:

[N]or shall any State . . . deprive any person of . . . property, without due process of law . . .

28 U.S.C. §1738:

The records and judicial proceedings of any court of any . . . State . . . shall have the same full faith and credit in every

court within the United States . . . as they have by law or usage in the courts of such State . . .

STATEMENT OF THE CASE

A. Introduction

The complaint in the §1983 action below, makes the gravely serious allegation that the defendant Justices of the California Court of Appeal for the First Appellate District, conspired with private party defendants, the Bank of America ("Bank") and attorneys for the Bank, to subvert justice by rendering a corrupt decision in favor of the Bank on the Bank's appeal pending before the panel, and seeks injunctive relief against the Justices.

The natural reaction of any Court or jurist hearing of such a serious charge is to seriously doubt that respected appellate court judges would ever engage in such misconduct and to question whether there is a sound factual basis for such charges. Accordingly, we wish at the outset of discussion in this Court to address those two concerns, just as we did in the lower courts.

First, we respectfully and gratefully acknowledge that the vast majority of state and federal trial and appellate jurists are all men and women of high honor, strongly dedicated to the fair and impartial administration of justice. However, the deeply regrettable but inescapable truth is that instances of judicial misconduct by state or federal trial or appellate jurists do occur, even if only two or three times in a century. *United States v. Manton*, 107 F.2d 834 (2d Cir. 1939) is one such case. There, Senior Circuit Judge Martin T. Manton of the Second Circuit had been indicted and convicted for conspiracy to obstruct justice, by means of soliciting and accepting gifts, loans and purported loans, from litigants who had appeals pending before him, in return for his promise to have his panel render a decision in favor of that litigant, and the Second Circuit affirmed his conviction. (*Id.* at 837 and 850)

Root Refining Co. v. Universal Oil Products Co., 169 F.2d 514 (3d Cir. 1948) is another such case. There, the Third Circuit set aside a number of decisions rendered by the Court, on the grounds that they had been obtained by fraud upon the Court, consisting of former Circuit Judge J. Warren Davis having corruptly

agreed to render decisions in favor of parties having appeals pending before him in return for financial favors and benefits that would indirectly flow to him as a result of loan transactions. The Third Circuit noted in its opinion that the other two Circuit Judges on the panel appeared to have cooperated with Judge Davis, in rendition of decisions in the manner which he desired, even though there was no evidence that they personally received any financial gain or benefits themselves other than the personal satisfaction of assisting their colleague in dealing with his financial problems.

Thus, while fortunately extremely rare, such instances do occur and a reading of the First Amended Complaint ("complaint") in the action below and of the *Manton* and *Root Refining* cases, discloses a striking similarity between the facts in those cases, and the facts in the present case as alleged in the complaint of Mrs. Kruse.

Secondly, the complaint was filed in good faith, after over 10 months factual investigation and legal research. To demonstrate this, counsel for plaintiff Mrs. Kruse went far beyond the specific pleading required by FRCP Rule 9(b) in cases of this type and pleaded not merely ultimate facts, but also probative facts in the complaint, and filed with the complaint a 371-page appendix to the complaint containing documentary and testimonial evidence gathered in the pre-filing investigation, which supported the allegtions of the complaint; and which appendix recited the reasonable inferences which had been drawn from the evidence and relied upon by counsel in filing the complaint.

B. Relevant Proceedings In The State Courts

In July 1985, after trial by jury, Petitioner Mrs. Kruse, then a 70-year-old widow, recovered a $3.77 million fraud judgment against the Bank of America, $1 million of which judgment was a punitive damage award.

In that same month, July, 1985, the California Supreme Court reinstated a $2,000,000 fraud judgment against the Bank of America, after the California Court of Appeal for the First Appellate District, acting through Division One, and a panel thereof which included Justices Racanelli and Newsom, had reversed the Sanchez-Coreas' judgment against the Bank of America ("Bank") on grounds

of lack of substantial evidence to support the verdict. In reinstating the Sanchez-Coreas' judgment, the California Supreme Court held that when the evidence was viewed in the light most favorable to the judgment, there was abundant evidence to support the judgment.

The Bank appealed Mrs. Kruse's judgment to the Court of Appeal for the First District, and the appeal was assigned to Division One, and a panel which included Justices Racanelli and Newsom, and three years later in May, 1988, those Justices reversed her judgment, on grounds of lack of substantial evidence to support the judgment, just as they had done five years earlier in 1983, in reversing the Sanchez-Coreas' judgment. In addition, the Justices reviewed Mrs. Kruse's judgment on different legal theories than those on which she had recovered judgment, and held that her fraud judgment was really a recovery on the theory of breach of contract, and there was no evidence to support a contract claim.

Counsel were shocked and puzzled by the reversal, but were unaware that this was the same panel which had reversed the Sanchez-Coreas' judgment five years earlier. Counsel had learned that two years earlier in 1986, at oral argument on an unrelated case, but involving the Bank of America; Justices Racanelli and Newsom had announced that they had minor financial relationships with the Bank of America, which were technically disqualifying, and they would not be able to hear argument on the case unless their disqualification was waived. Recalling this, counsel filed a petition for rehearing and also a motion for recusal, asking the panel to first grant rehearing and then recuse themselves, or alternatively, make full disclosure of all facts bearing upon their financial relationship to the Bank. The petition for rehearing and the motion were denied in separate orders at the same time, with no disclosure of the financial relationship to the Bank.

Mrs. Kruse petitioned the California Supreme Court for review. One of the grounds for review is lack of a qualified majority on the panel of the Court of Appeal, so counsel for Mrs. Kruse took the unusual and unprecedented step of filing a motion asking to be allowed to depose Justices Racanelli and Newsom on the subject of their financial, personal and social relationship to the Bank, to obtain evidence to establish a reasonable appearance of bias. Recognizing that such unusual discovery should not be allowed unless counsel could make a prima facie showing of appearance of

bias or conflict of interest, counsel sent points and authorities and letter briefs to the Supreme Court arguing that they had affadavits, newspaper articles and books, showing such prima facie evidence of appearance of bias, and that reasonable appearance of bias would establish a denial of due process.

In her petition for review, Mrs. Kruse claimed denial of due process by switching theories of appellate review and denial of equal protection by failing to view the evidence in the light most favorable to the judgment. The Supreme Court denied the motion to take evidence and denied the petition for review in the same document. The order denying the motion stated it was denied because of failure to make a prima facie showing of conflict of interest or bias, much less denial of due process. The order denying the petition for review was a standard routine one-sentence statement that the petition for review was denied. (Appendix p. 40)

Mrs. Kruse then petitioned this Court for certiorari to the State Court of Appeal (App. 57), because while the federal questions had been raised at the first opportunity in the petition for review to the California Supreme Court, that court had denied review and refused to assume jurisdiction, thus making the Court of Appeal the highest court in which a decision could be had. It is significant to note that counsel for the Bank opposed the certiorari petition on various jurisdictional grounds, but did not claim that the writ was directed to the wrong court, and thus did not make any claim that the California Supreme Court's order denying review was supposedly a res judicata decision on the merits. This Court denied certiorari.

C. Proceedings In The Courts Below

Thereafter, the underlying §1983 action was filed in April, 1989. By that time, after ten month's investigation, counsel had learned the facts showing the conspiracy pleaded in the complaint, and supported by the 371-page appendix of evidence. Significantly the Bank had made only two major loans to Justice Newsom, seven years apart, one in the amount of $50,000, and the other, a line of credit, with a maximum of $50,000, and the timing of those loans was that one was made when the Sanchez-Coreas' appeal was pending before Division One, and the other was made just before the Kruse appeal was assigned to Division One. Moreover, probate

court records and other records show that Justice Newsom was executor of his parents' probate estates, and that one of his brothers, Brennen Newsom, an attorney, acted as attorney for the estate, and that other brothers and sisters had become concerned about their fiscal management of the estates and had retained attorney David Flinn to represent them against Justice Newsom and his brother Brennen, who had taken monies out of the probate estate without the knowledge or consent of the other brother and sisters, and had invested those in a gambling casino in Nevada which went bankrupt, and Justice Newsom and his brother were forced by attorney Flinn to enter into a settlement, waive all of their extraordinary fees, and reimburse the estates for the monies improperly taken out, and this was done at a time when attorney Flinn, a former in-house attorney for the Bank, was appearing as counsel for the Bank on the Sanchez-Coreas' appeal before Justices Racanelli and Newsom and was thus in a position to accuse Justice Newsom of having embezzled monies from his parents' probate estates.

In addition, during the time Justices Racanelli and Newsom sat on the Sanchez-Coreas' appeal, they were absolutely disqualified under California law to sit on that appeal because of having a debtor or creditor relationship to the Bank of America, but though required by law to disclose their disqualification, they each and both concealed it and thereafter rendered their decision reversing the Sanchez-Coreas' judgment which was then reinstated by the California Supreme Court.

The Bank changed attorneys for the §1983 action, apparently not wishing to use O'Melveny and Myers, who had agreed that the California Supreme Court had not rendered a decision on the merits by denying review; and the new attorneys for the Bank filed a motion to dismiss the underlying §1983 action on the grounds that the Supreme Court's denial of review and refusal to assume jurisdiction was a res judicata decision on the merits of the federal constitutional issues raised in the petition for review, which had supposedly created Rooker-Feldman and res judicata bars.

The District Judge dismissed the action on grounds of Rooker Feldman and res judicata bars, in an order which begins discussion with a quote from *Pierson v. Ray*, 386 U.S. 547; 18 L.Ed. 2d 565 (1980) indicating judicial immunity was the guiding principle of the order. (App. 11) Thereafter, the District Judge granted

motions for Rule 11 sanctions on the basis of accepting as true all declarations submitted by Justice Newsom, including his brothers and sisters who now supported him by stating that it was only Brennen who had improperly removed monies from the probate estates. However, bankruptcy records of the gambling casino conclusively showed that Justice Newsom had removed $40,000 from the probate estates without the knowledge or consent of his brother Patrick and his sisters. Nevertheless, the District Judge rejected all documentary evidence submitted by counsel for Mrs. Kruse, refused to draw any inferences from that evidence, and imposed sanctions.

The Circuit Court of Appeals affirmed in a Memorandum two-sentence decision, "for the reasons stated by the trial judge."

REASONS FOR GRANTING THE WRIT

I. Introduction and Summary of Agrument

We respectfully submit that the Court of Appeals has affirmed and sanctioned a course of conduct by the District Court which departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision; and that that course of conduct and the motivation for engaging in it, were as follows:

The District Court's order dismissing the action (App. 11) states, in part expressly and in part by implication, the District Court's conviction that in order to properly maintain independence of the state judiciary and maintain public confidence in the integrity of both the state and federal judiciary; it is necessary to grant state jurists complete judicial immunity against §1983 actions; that *Pierson v. Ray*, 386 U.S. 547, 545-555; 18 L.Ed. 2d 288 (1967) partly solved the problem by granting immunity against damages but this Court's later decision in *Pulliam v. Allen*, 466 U.S. 522; 80 L.Ed. 2d 565 (1980) is bad law, because it permits §1983 actions for equitable relief; and that the four dissenting Justices in Pulliam were correct in their view that judicial immunity should be extended to completely bar any and all relief against state jurists in §1983 actions.

Accordingly, we submit that when the District Court was presented with the present action alleging rendition of a corrupt

judicial decision by state jurists, but seeking only the equitable relief permissible under *Pulliam*, the District Court undertook, and the Court of Appeals later sanctioned, a course of judicial conduct designed to avoid following *Pulliam*, and to confer judicial immunity against equitable relief by indirect means; namely, deliberate and intentional adoption of erroneous rules of law, and even fictions of law, to support dismissal of the action against the state jurists on a stated ground other than judicial immunity, but for the purpose of achieving the same result as if the state jurists had complete judicial immunity.

We submit the record discloses that pursuant to this intent, the District Court dismissed the action on the erroneous ground that it was barred under the Rooker-Feldman[1] doctrine, because the State Court of Appeal's decision on the merits of Mrs. Kruse's tort causes of action, was a decision on issues inextricably intertwined with the federal questions later raised in her §1983 action, even though federal law had no controlling bearing upon the decision on the merits to be made in the State court action. The District Court also based its dismissal of the action on the completely erroneous and fictional ground that a routine one sentence order of the California Supreme Court denying Mrs. Kruse's petition for discretionary appellate review, was a res judicata decision on the merits of the federal constitutional questions raised in her petition, which order gave rise to a Rooker-Feldman jurisdictional bar to her later §1983 action raising those same federal questions.

While the erroneous dismissal of the defendant state jurists may have been a justifiable means of seeking to bring about this Court's reconsideration of Pulliam to recognize complete judicial immunity in this type of case and to therefore affirm the dismissal of the state jurists on that ground; this in no way justifies the conscious and deliberate erroneous dismissal of the private party defendants, since even if this Court reconsiders Pulliam and affirms the dismissal of the state jurists upon the basis of newly recognized judicial immunity; the erroneous dismissal of the private party defendants still represents a refusal by the District Court to exercise

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[1] *Rooker v. Fidelity Trust Co.*, 263 U.S. 413; 68 L.Ed. 362 (1923) and *District of Columbia Court of Appeal v. Feldman*, 460 U.S.; 75 L.Ed. 2d 206 (1983)

the §1983 jurisdiction conferred under *Dennis v. Sparks*, 449 U.S. 24; 66 L.Ed. 2d 185 (1980). This Court should therefore correct that refusal to exercise jurisdiction, by reversing the dismissal of the private party defendants.

Moreover, with respect to the Rule 11 sanctions, it was a violation of due process to impose sanctions on the basis of the erroneous dismissal, and this Court should exercise its supervisory power to vacate all of the sanctions awards on that basis; and, with respect to the sanctions awarded to Justice Newsom, for the additional reason of unclean hands on the part of Justice Newsom and his counsel in deliberately inflating those fees to excessive and unconscionable amounts, misrepresenting to the District Court and the Court of Appeals that the attorneys fees were reasonable and necessarily incurred, and obtaining an award of sanctions which is so excessive it will force attorney Watson into bankruptcy reorganization to avoid distress sales of properties that are his and his wife's only source of retirement income.

II. The Court Should Settle The Important Question Of When The Issues Are "Inextricably Intertwined"

As previously noted, one of the bases for dismissal was that the State Court of Appeal's decision on the merits of Mrs. Kruse's state law tort causes of action, was a decision on issues which were inextricably intertwined with the federal constitutional issues later raised in the §1983 action, so as to give rise to a Rooker-Feldman bar. (App. 12-13)

To demonstrate that the Court of Appeals erred in so ruling it is first necessary to define the concept of the issues being "inextricably intertwined" as that phrase is used in *Feldman*. (See 460 U.S. at 482 fn. 16 and 486-487). This court did not attempt such definition in *Feldman*, and although the issue was raised in *Pennzoil Co. v. Texaco, Inc.*, 41 U.S. 1; 95 L.Ed. 2d 1 (1987) the holding in that case was that the District Court should have abstained, and the Court therefore did not reach the issue; and to date, the Court has not defined that legal concept.

The question is a frequently recurring one in numerous §1983 actions and is controlling on the issue of whether the federal District Courts do or do not have jurisdiction to hear and decide a particular §1983 action alleging violation of federal constitutional

rights by state officials; and this important question should be settled by the Court.

We submit that the Court of Appeals erred in its ruling that the issues decided on their merits by the State Court of Appeal, were inextricably intertwined with the federal constitutional issues raised in the later §1983 action as shown by the following analysis:

Rooker holds that where a case or cause was pending in a state court and a federal law question "actually arose in the cause" (263 U.S. at 415) and the federal question was considered and expressly decided by the state court as part of its decision on the merits; then even if the federal question was erroneously decided, this does not render the state court judgment void, but rather merely leaves it "open to reversal or modification in an appropriate and timely appellate proceeding." (Ibid.) Thus, a federal district court which has no appellate review jurisdiction over state court judgments deciding federal questions, has no jurisdiction to entertain a §1983 action raising the same federal question previously decided by the state court, since this would amount to appellate review of the state court's decision on the merits. (Id. at 416)

Feldman extended the *Rooker* holding to apply even when the federal question which "arose" in the state court action was not decided by the state court, provided the issues which were decided were "inextricably interrelated" to the federal questions. Thus, it is significant to note that in *Rooker* the federal question which "arose in the cause" pending in the state court, could arise in the state court action only if federal law was applicable to and had a controlling bearing upon the issues to be decided on their merits in the state court action. We submit that analysis of *Feldman*, and other decisions will demonstrate that the issues decided in a state court action can be "inextricably intertwined" with the federal questions raised in a later §1983 action, only when federal law was applicable to and had a controlling bearing upon, the decision to be made on the merits in the earlier state court action.

In *Feldman*, admission to the District of Columbia bar required passing a bar examination, but waiver of this requirement was available on application and had been given to others in the past. Federal due process and equal protection were thus applicable and controlling on granting of such waivers: The Court had to use a rational and reasonable method of evaluating the qualifications of an applicant for waiver, and had to give fair and equal treatment to all applicants. However, plaintiff Hickey did not raise due process or equal protection arguments to the Court, and the Court

did not consider or expressly pass upon those issues in denying his application for waiver.

Nevertheless, this Court held that Hickey's and Feldman's subsequent §1983 actions were properly dismissed, because the constitutional objections of denial of due process and equal protection, were inextricably intertwined with the decision on the merits made in the prior Court proceeding. We submit this demonstrates that the issues are inextricably intertwined, when federal law is applicable to and controlling upon the decision on the merits to be made in the state court, and that this is confirmed by the decisions and reasoning in *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1144-1145; *Rhoades v. Pennfold*, 694 F.2d 1043, 1047; and the five concurring opinions in Pennzoil Co. v. Texaco, Inc., 41 U.S. 1, 18-25; 95 L.Ed. 2d 1 (1987).

To illustrate, in *Allah v. Superior Court*, 871 F. 2d 887 (9th Cir. 1989) federal due process was controlling on the decision to be made on the merits of the substantive claims asserted by the plaintiff; namely, whether those claims could be dismissed without a trial on the merits, because of plaintiff's willful refusal to make discovery being taken as an admission of lack of merit to those claims, under *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 349; 53 L.Ed. 530 (1909). Accordingly, when the state court dismissed the plaintiff's action for refusal to make discovery, it decided issues which were governed and controlled by federal due process rights, even though no mention of this was made in the order dismissing the action. Thus, the issues decided in the state action were inextricably intertwined with the federal due process issue raised in the later §1983 action, which action was held to be properly dismissed under the Rooker-Feldman doctrine.

Likewise, in *Worldwide Church of God v. McNair*, 805 F.2d 888 (9th Cir. 1986) the substantive claims asserted were for defamation by a church and its officers and federal law was controlling on the decision to be made on the merits, because the defendants asserted that the defamatory statements were part of pronouncements of church doctrine and privileged under the First Amendment. Thus, while the state court did not expressly rule upon the federal question, its decision on the merits of the substantive claims was a decision on issues inextricably intertwined with the federal constitutional issues raised in the later §1983 action and the Ninth Circuit held Rooker-Feldman was a bar to jurisdiction.

By contrast, in the present case, where federal law was not controlling upon the decision to be made on the state law substan-

tive tort claims asserted by Mrs. Kruse against the Bank, the Court of Appeal's decision on the merits of those substantive tort claims was a decision on issues which were in no way related to, much less inextricably intertwined with, the federal due process and equal protection claims asserted in the §1983 action below, having to do with use of unconstitutional appellate review procedures by a biased panel, which denied Mrs. Kruse a fair appellate review by a fair tribunal. The relief she sought was enjoining enforcement of the State Court of Appeal decision, and requiring rehearing of the appeal by a fair and impartial panel, using constitutional procedures of review, but leaving such new panel, using constitutional procedures of review, completely free to make its own unfettered decision on the merits.

III. The Ruling That The California Supreme Court's Order Denying Review Gave Rise To Rooker-Feldman Res Judicata Bars, Was An Intentionally Erroneous Ruling In Conflict With 28 U.S.C. §1738 And Decisions Of This Court

The District Court and Court of Appeals acknowledge that the defenses of Rooker-Feldman and res judicata both depend upon a prior decision on the merits having been rendered. (App. 15-16, 24) Thus, the District Court's dismissal of the action was primarily based upon taking judicial notice of the California Supreme Court's order denying Mrs. Kruse's petition for review, and holding that order to be a res judicata decision on the merits of the federal constitutional issues raised in that petition.

In construing the order, the District Judge was required under 28 U.S.C. §1738 to give it the same legal effect as it would be given by the California courts under California law. Moreover, the District Judge was not permitted to give that order any additional or greater preclusive effect that might be accorded to such order had it been made by a federal court. *Oklahoma Packing Company v. Oklahoma Gas & Electric Co.*, 309 U.S. 4, 7-8; 84 L.Ed. 537 (1940); *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 88; 79 L.Ed.2d 56 (1984).

Instead of so construing the order, the District Court intentionally disregarded §1738 and *Migra* and deliberately adopted the fiction that Mrs. Kruse's petition was not a petition for discretionary appellate review, but rather was a petition for writ of mandate, and the Supreme Court's order a denial of petition for mandate, which was a res judicata decision on the merits. However, treating the order as what it was, a denial of petition for appellate

review, and construing it under California law, it plainly was not a decision on the merits, as shown by the following analysis:

A. The Order Denying Review Was Not A Judgment On The Merits Because It Was A Refusal To Assume Jurisdiction

The California Constitution confers no appeal of right to the California Supreme Court from the decision of a Court of Appeal; instead, Article 6 §12(b) provides that "The Supreme Court may review the decision of a Court of Appeal in any cause." (Emphasis added). This discretionary jurisdiction was first conferred in 1904 and provided that the Supreme Court's grant of hearing transferred the cause to itself and vacated the Court of Appeal decision, so the Supreme Court then directly reviewed the trial court judgment. The constitutional amendment of 1984 adopted a procedure identical to that used by this Court in its discretionary certiorari review, and since 1985, if the California Supreme Court first exercises its discretion to grant review, it then reviews all or part of the Court of Appeal decision, and no longer directly reviews the trial court judgment, as it formerly did. However, the basic discretionary nature of the jurisdiction remains unchanged, so earlier cases construing its nature and manner of exercise are still good law.

In *People v. Davis* (1905) 147 Cal. 346, the Supreme Court held the jurisdiction was conferred to resolve conflicts in decisions of the Courts of Appeal, and settle important questions of law (Id. at 348) and that:

> "...[T]he parties have no right to insist upon the exercise of this power. They may petition for it, but the action of this court in any case is purely discretionary..." (Id. at 349)

Under California law the term "cause" is used to mean "every matter that could come before a court for decision" (*Quezada v. Superior Court* (1959) 171 Cal.App.2d 528, 530), and "cause" is sometimes used synonymously with "case" or "action". *Painter v. Bergland* (1939) 31 Cal.App. 2d 63, 70. Under California law, to render a valid judgment on the merits, the court must have jurisdiction over the cause and the parties. California Code of Civil Procedure §1917; *Northington v. Industrial Accident Commission* (1937) 23 Cal.App.2d 255, 259 ["Jurisdiction to support a judgment is jurisdiction over the cause and over the parties".]

Therefore, since rendition of a valid decision on the merits requires that the court have jurisdiction over the cause, the only way

the California Supreme Court can render an appellate review decision on the merits of a decision of a Court of Appeal, is for the California Supreme Court to first assume jurisdiction to review that Court of Appeal decision, and to assume jurisdiction, the Supreme Court must grant the Petition for Review. An order denying review is a refusal to assume discretionary jurisdiction over that Court of Appeal decision, and thus a refusal to assume the very jurisdiction necessary to render a decision on the merits; just as an order of this Court denying certiorari is a refusal to assume jurisdiction, and is not a res judicata decision on the merits of the questions raised in the petition. For this reason alone, the California Supreme Court's order denying review was not a decision on the merits of the federal questions raised in the petition.

B. The Order Denying Review Was Not A Decision On The Merits For The Additional Reason That There Was No Compliance With The Constitutional Requirements For Rendition Of A Decision On The Merits

Article 6 §2 of the California Constitution provides:

> "The Supreme Court consists of the Chief Justice of California and 6 associate justices. The Chief Justice may convene the court at any time. Concurrence of 4 judges present at the argument is necessary for a judgment. (Emphasis added)

Moreover, Article 6 §14 provides in pertinent part "Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated". (Emphasis added) "Causes" are appellate review proceedings which are pending in the appellate court, and "decisions determining causes" are decisions on the merits of an appeal or appellate review proceeding which is pending in the appellate court. *Metropolitan Water District v. Adams* (1942) 19 Cal. 2d 463, 468-469.

In *Metropolitan* the California Supreme Court granted hearing, rendered an appellate review decision on the merits, but then upon petition for rehearing, made an order granting rehearing. The party aggrieved by the order granting rehearing, filed a motion to vacate that order, basing the motion on the argument that the order was in reality a judgment on the merits, which was invalid, because the order was not concurred in by four Justices who had been present at the oral argument which preceded the entry of the judgment, which judgment was set aside by the order granting rehearing.

Because of the importance of the jurisdictional issues raised, the Supreme Court wrote and published an opinion denying the motion. In that opinion, the Court squarely held that orders granting or denying petitions for transfer (now called petitions for review) are not judgments on the merits. Id. at 468-469.

In summary, before the California Supreme Court can render a decision on the merits of a decision of the Court of Appeal, the Supreme Court must grant review, permit the parties to have oral argument, and then at least four of the Justices of the Court who were present at the oral argument, must concur in and sign the written decision on the merits, stating in their opinion the reasons for their decision. That decision on the merits will then be published in the official reports, because all opinions and decisions of the Supreme Court reviewing the merits of a Court of Appeal decision are, without exception, published in the official reports. California Rules of Court, Rule 976(a).

An additional statutory requirement for an appellate review judgment on the merits is set forth in California Civil Code §43 which reads in pertinent part:

> "The Supreme Court, and the courts of appeal, may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had..."

Thus, in *Unemployment Commission v. St. Francis Association* (1943) 58 Cal.App.2d 271, the Court holds that where a California court is exercising appellate jurisdiction, as contrasted to original jurisdiction, then:

> "On appeal, the jurisdiction of the Supreme Court and the District Courts of Appeal is confined to anappropriate order of affirmance, modification, reversal, an order for a new trial or direction that further proceedings be had..." (58 Cal.App.2d at 274, emphasis added)

The Court in *Unemployment Commission* further holds that where a California court is exercising its original jurisdiction, it may render an order, judgment or decree of its own, but that where the court is not exercising original jurisdiction, and is rather exercising appellate jurisdiction, then that court:

> "...may not render the same or a different order, judgment or decree of its own, but is confined to an affirmance, modification or reversal of the judgment...[of the lower court which is being reviewed]. ..." (58 Cal.App.2d at 275, emphasis and bracketed words added)

Therefore, it is conclusively and indisputably established, that the September 1, 1988 order of the California Supreme Court denying Mrs. Kruse's Petition For Review of the May 18, 1988 decision of the Court of Appeal, was not a decision on the merits of that Court of Appeal decision or the federal questions raised in the petition, because the California Supreme Court (1) did not grant review and thus did not assume jurisdiction to review that Court of Appeal decision (2) therefore did not hear oral argument, since the cause was not pending before it (3) none of the Justices were present at oral argument (since there was none) (4) there was no written opinion and decision signed by at least four Justices who had been present at oral argument (which did not occur) and (5) there was no written decision and opinion on the merits published in the official reports, which affirmed, reversed, or modified the Court of Appeal decision.

C. A Letter From The California Supreme Court Conclusively Confirms That Its Order Was Not A Decision On The Merits

The fact that the California Supreme Court cannot exercise its discretionary review jurisdiction to review a Court of Appeal decision, unless the Supreme Court first grants the Petition for Review so as to convert the case into a "cause", meaning a case over which jurisdiction has been assumed and is pending in the Supreme Court; is conclusively established by the letter from the Clerk of the California Supreme Court, written to counsel for Mrs. Kruse, at the direction of the Supreme Court, and explaining the refusal of the Supreme Court to accept for filing, her petition for rehearing on the Supreme Court's order denying her petition for review. In that letter (App. 41) the Supreme Court, speaking through its Clerk, states:

> "[A] summary denial of a petition for review is not a decision that determines a cause...
>
> Rule 27(a) of the California Rules of Court provides that this court may grant a rehearing 'after its own decision in any cause.' A case does not

become a 'cause' in the Supreme Court until review is granted pursuant to rule 28..." (Emphasis added)

D. Decisions Of This Court Confirm That The Order Denying Review Was Not A Decision On The Merits

The law of some states permits the court of last resort to exercise its discretionary appellate review jurisdiction informally. Nevertheless, even in those states, appellate review jurisdiction, by very definition, can only be exercised by a decision which affirms, reverses, modifies, etc. a lower court decision. Therefore, even in those states, an order denying a petition for discretionary appellate review, accompanied by an opinion on the merits (i.e., a statement that the reason for denial of review is that the lower court's decision was sound and correct on the merits) is still not an appellate review decision on the merits, unless it affirms, reverses, etc. the lower court decision.

This is demonstrated by decisions of this Court construing its jurisdiction under 28 U.S.C. §1257(a) to conduct certiorari review of a "final judgment" rendered by the "highest court of a State in which a decision could be had", where a federal question was raised in the State court.

Norfolk & Suburban Turnpike Company v. Commonwealth of Virginia, 225 U.S. 264; 56 L.Ed. 1082 (1911), holds that a state court of last resort's order refusing to grant discretionary appellate review, which states that the reason for denying review is that the lower court's judgment was correct on the merits of the federal question; cannot be regarded as a decision on the merits by the higher court, unless:

> "... it plainly appears, on the face of the record, by an affirmance in express terms of the judgment or decree sought to be reviewed, that the refusal of the court to allow an appeal or writ of error was the exercise by it of jurisdiction to review the case upon the merits ..." (225 U.S. at 269, emphasis added)

Likewise, in *American Railway Express Co. v. Levee*, 263 U.S. 19; 68 L.Ed. 140 (1923) the Court held that an order denying review, accompanied by an opinion on the merits, but not stating it was an affirmance of the lower court's judgment, was not a decision on the merits, the Court noting:

> "Another section of the article cited required the Supreme Court to give its reasons for refusing the writ; and therefore the fact that the reason happened to be an opinion on the merits rather than some more technical consideration did not take from the refusal its ostensible character of declining jurisdiction. .." (Id. at 20-21, emphasis added)

A fortiori, where the California Constitution does not permit an informal appellate review decision by the California Supreme Court in the first place, the only way the Supreme Court can render an appellate review decision on the merits of federal questions raised in the petition, is to first assume jurisdiction and the only way it can assume jurisdiction is to grant review, not deny it. Thus, the Supreme Court's order denying review was not a decision on the merits, as the Supreme Court itself stated in its letter (App. 20).

All of the foregoing state law was brought to the attention of the District Judge prior to her initial dismissal order, and the additional federal law was briefed prior to her final ruling denying plaintiff's motion for reconsideration. The letter from the California Supreme Court was repeatedly called to her attention. But neither in her original dismissal order nor in her order denying reconsideration, did the District Judge consider or even mention, any of that controlling California constitutional, statutory and case law; nor did she deign to consider or mention the cited decisions of this Court. Instead, she consciously and deliberately ignored all the controlling law, and clung steadfastly to the legal fiction and erroneous theory next discussed.

E. The District Court Deliberately Adopted The Fiction That The Order Was One Denying Petition For Writ Of Mandate With An Opinion On The Merits, And Thus A Decision On The Merits

As shown above, the California Supreme Court's order denying review was not a res judicata decision on the merits. Apparently realizing this, and determined to circumvent *Pulliam* and to bar the action for equitable relief as though the state jurists had complete judicial immunity; the District Court adopted the fiction that the petition was one for writ of mandate, governed by the totally different and completely inapplicable California law governing a California appellate court's exercise of its original jurisdiction in response to a petition for writ of mandate. (App. 16)

It is settled California law that a petition for mandate is a type of complaint which may be challenged by general demurrer and an appellate court order denying a petition for writ of mandate, which states that the reason for denial is a failure to state facts sufficient to entitle the petitioner to issuance of the writ, is a decision on the merits and res judicata, as held in the decisions cited and relied upon by the District Judge, *Richer v. Superior Court* (1976) 63 Cal.App.3d 748, 756, and *Miofsky v. Superior Court*, 703 F.2d 332, 336 (9th. Cir. 1983) (App. 16).

To attempt to show an opinion of lack of merit to the petition, the District Judge relied upon yet another fiction. Both the order denying the motion to take evidence and the order denying the petition for review were contained in the same document. The order denying the motion contained a statement of reasons for that denial, whereas the order denying the petition for review was a routine summary one sentence denial without reasons, which simply stated "The petitions for review are DENIED." (App. 40)[2] Despite this, the District Judge relied upon the fiction that the statement of reasons for denying the motion must be taken as a statement of reasons for denying the petition for review, and that this denial of the petition for writ of "mandate" was therefore a denial accompanied by an opinion of lack of merit to the petition for "mandate", which was thus a res judicata decision on the merits.

The short answer to all this is that there was no petition for mandate. The petition denied by the California Supreme Court was a petition for review, which was routinely denied without opinion or statement of reasons; and under the California Constitution, that order denying review, with or without an opinion, cannot be a decision on the merits because review was not granted, and jurisdiction was never assumed.

IV. The Court Should Settle The Question Of Whether There Is Judicial Immunity Against Equitable Relief In An Action Of This Type, And Whether *Pulliam* Should Be Modified Or Distinguished Accordingly

A. Introduction

Counsel for Mrs. Kruse had, at the time of filing the §1983 action in April 1989, good reason to join the State Justices as

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[2] The statement was in the plural, because there were other parties to the action who had petitioned for review.

defendants and seek equitable relief against them, under the authority of *Pulliam*. The defendant Justices reversed Mrs. Kruse's judgment and remanded for new trial; but the Bank thereafter obtained from a different Division of the same State Court of Appeal, a writ compelling the Trial Court to enter judgment in favor of the Bank, instead of proceeding with retrial. Therefore, it is doubtful whether an injunction issued by the federal District Court, enjoining enforcement of the May, 1988 appellate decision reversing and remanding for new trial, would have any legal effect on the subsequent writ which ordered entry of judgment in favor of the Bank, which writ has long since become final.

In addition, within the last year, counsel for Mrs. Kruse has become aware of the very strong sentiment in the state and federal judiciary to overrule or modify *Pulliam* and the intense lobbying of Congress which has gone on over the last six years, so far unsuccessfully, for legislation to overcome or modify the *Pulliam* decision.

For all these reasons, it now appears to Mrs. Kruse and her counsel, that the ends of justice and balancing of the competing public interests in maintenance of independence of the state judiciary, and protection of the public against violation of federal constitutional rights by state judicial officers, can best be achieved by extending judicial immunity against equitable relief in cases of this type, and permitting §1983 plaintiffs to pursue the private party defendants under *Dennis v. Sparks*, provided this Court resolves the speculative damages issue and problem hereinafter discussed.

B. In *Pulliam* The Court Considered Only The Issue Of Extending Judicial Immunity To Bar Injunctive Relief In All Cases Without Exception

In *Pulliam* the dissent argued for complete judicial immunity in all cases, because the true basis for judicial immunity is to protect jurists against "the threat of vexatious litigation should judges be required to defend their judicial acts in collateral civil proceedings" (Id. at 547).

The majority conceded that maintenance of judicial independence was a public concern of paramount importance, but nevertheless concluded that judicial independence was not unduly impaired by permitting injunctive relief in exceptional cases, to prevent irreparable harm to federal constitutional rights.

In footnote 6, the Court cites decisions from the various Circuits holding that judicial immunity is not a bar to injunctive relief against a state jurist, including the decision in *Richardson v. Koshiba*, 693 F.2d 911 (9th Cir. 1982). However, examination of those decisions discloses that none of them involved cases of a type where it could be held as a matter of law that (1) that type of case posed a serious threat to judicial independence, (2) there was an adequate remedy at law available in the form of recovery of money damages and (3) injunctive relief was not necessary to prevent irreparable harm to federal constitutional rights. Thus, all of the cases cited in footnotes 6 and 16 of the opinion in *Pulliam*, as well as *Pulliam* itself, are seen to be distinguishable because they are the very type of "exceptional cases" to which it would be improper to extend judicial immunity.

C. It Would Be Legally Sound And Proper To Protect Judicial Independence By Extending Judicial Immunity To Bar Injunctive Relief In Cases Of The Present Type

In light of the foregoing discussion, it is apparent that if the speculative damages issue and problem is resolved, then in the extraordinarily rare cases of the present type, it can be said, as a matter of law, that (1) it poses a serious threat to judicial independence, (2) if the conspiracy and corrupt judicial decision are proven, money damages can be recovered, and (3) there is therefore no need for injunctive relief against state jurists, for the following reasons:

First, the type of case which poses the most serious threat to principled and fearless decision-making, is a suit alleging a conspiracy between a state jurist and private parties to render a corrupt judicial decision against the person who later becomes the §1983 plaintiff. Thus, this rarely occuring type of case is the one which would require the greatest showing of need for injunctive relief to prevent irreparable harm to constitutional rights, before the balance of the scales could be tipped in favor of injunctive relief, and against judicial immunity from such relief.

Second, cases of this type are, by very definition, cases in which there is an adequate remedy at law, and no need for injunctive relief to prevent irreparable harm to federal constitutional rights. This is so because the unanimous decision of the Court in *Dennis v. Sparks*, 449 U.S. 24; 66 L.Ed. 2d 185 (1980), established that while state jurists are immune from damages in §1983 actions, the private parties alleged to have conspired with them are not, and the action may proceed against them, because this is necessary to provide "a

remedy against those private persons who participate in subverting the judicial process and in so doing inflict injury on other persons." (449 U.S. at 32) Thus, in every such case, the §1983 plaintiff can proceed against the private parties and upon proof of his or her case, can recover money damages that will fully compensate for any injury or damage inflicted by the corruptly obtained judicial decision.

This is true despite the problem of speculative damages, i.e. whether, in the absence of the corrupt judicial decision, the §1983 plaintiff would have prevailed in the prior state trial or appellate court proceedings. In these rarely occuring cases, that problem can be handled as it is in the situation where a party litigant persists in willful refusal to make discovery, and may therefore be subjected to the ultimate sanction of striking of his or her complaint or answer. This is done on the theory that the culpable party has, by that conduct, admitted a lack of merit to his or her action or defense, or position on appeal; and is thus not denied due process, by being deprived of a trial on the merits of an admittedly unmeritorious action, defense or position on appeal. *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 349; 53 L.Ed. 530 (1909); *Unger v. Los Angeles Transit Lines* (1960) 180 Cal.App. 2d 172, 186-187.

A fortiori, where the defendant in the §1983 action has found it necessary to conspire to obtain the corrupt decision in his or her favor; this is an even stronger admission of lack of merit to that party's position, so we submit this Court should declare the law to be that upon proof of conspiracy to subvert justice by rendition of a corrupt judgment in favor of a conspirator, this will establish as a matter of law, lack of merit to the legal position of the said conspirator.

Under such rule, it would be proper for the District Court in the §1983 action to hold as a matter of law that the §1983 plaintiff would have prevailed in the prior state court proceedings, but for the corrupt judicial decision, and to allow the trier of fact in the §1983 action to conduct a trial within a trial and decide what amount of damages the §1983 plaintiff would have recovered in the prior state trial court action, or, as in this case, allow the trier of fact to simply award the amount of the judgment that the §1983 plaintiff was allegedly improperly deprived of in the prior state appellate court proceedings.

D. Counsel Acted In Good Faith In Filing The Complaint Seeking Injunctive Relief Against The State Justices And Courts

In view of the fact that counsel for Mrs. Kruse is now urging this Court to extend judicial immunity to bar prospective injunctive relief in "cases such as the present case", and to affirm the dismissal of the state Justices and Courts on the basis of judicial immunity; the question may properly be asked why counsel ever named the state Justices and Courts as defendants in the first place, and did not merely sue the private party defendants for money damages under the authority of *Dennis v. Sparks*, *supra*.

The reason is that injunctive relief was not sought only on the conspiracy theory that we now say should be barred by judicial immunity. Rather, it is pleaded in the Fourth Claim of the complaint that even if the trier of fact were to conclude that the defendant Justices did not actually conspire, and were not actually or apparently biased; nevertheless, the intentional denial of due process by switching of legal theories in violation of the rule announced in *Cole v. Arkansas*, 333 U.S. 196, 202; 92 L.Ed 644 (1948) and *Spevak v. Kline*, 385 U.S. 511, 518; 17 L.Ed 574 (1967) and the intentional denial of equal protection by viewing the evidence and inferences in the light most favorable to the Bank, contrary to the rule announced in *Coppedge v. United States*, 369 U.S. 438, 448; 8 L.Ed 2d 21 (1962), rendered the appellate decision invalid and it should be so declared and its enforcement enjoined.

Thus, the Fourth Claim seeks injunctive relief on a theory and basis completely independent of the conspiracy/corrupt decision theory. In addition, at the time of filing the complaint, counsel anticipated that the private party defendants would raise the issue and defense of speculative damages, if plaintiff did not seek to enjoin enforcement of the decision and allow the Bank to renew its appeal, since theoretically, a fair and impartial rehearing of the appeal might still have resulted in a reversal of Mrs. Kruse's judgment. Counsel for Mrs. Kruse thus acted in good faith in naming the state Justices and Courts as defendants against whom prospective injunctive relief was sought.

V. This Court's Supervisory Power Should Be Exercised To Vacate The Erroneous Dismissal Of The Private Party Defendants, Even If This Court Reconsiders *Pulliam* To Grant Judicial Immunity And Affirm The Dismissal Of The State Jurists

Even if this Court were to reconsider *Pulliam* and modify that decision to extend judicial immunity and affirm the dismissal of the state court jurists, in the manner suggested above, the erroneous

dismissal of the private party defendants would still have to be reversed under *Dennis v. Sparks*, 449 U.S. 24, 29-32; 66 L.Ed.2d 185 (1980), because even if the state jurists with whom the private party defendants are alleged to have conspired, have judicial immunity and are not parties to the action; nevertheless, the private party defendants themselves have no derivative immunity.

VI. This Court Should Exercise Its Supervisory Power To Vacate The Rule 11 Sanctions Imposed

The imposition of Rule 11 sanctions based on the erroneous dismissal of the complaint and action, was violative of due process and thus this Court should exercise its supervisory power to correct that error by vacating the sanctions awards.

The Notes of Advisory Committee on Rules provide:

> "... [I]t is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation, and in the case of motions when the motion is decided or shortly thereafter. The procedure obviously must comport with due process requirements." (Emphasis added)

Before Rule 11 sanctions can be imposed for filing a legally frivolous complaint it must first be determined that the complaint is unsound in law. The complaint in the §1983 action below was and is sound in law; has never been challenged as being a facially defective pleading, and rather has only been challenged on the basis of affirmative defenses of Rooker-Feldman and res judicata. But the dismissal based upon those affirmative defenses has been demonstrated to be erroneous.

Since the complaint was sound in law and erroneously dismissed, sanctions for alleged factual frivolousness of the complaint could not be properly imposed, until it was first determined, in a manner consistent with due process, that the factual allegations of the complaint were false. Where the complaint is sound in law, and has not been disposed of by a valid order of dismissal, or a valid summary judgment motion, due process requires that the factual issues framed by the pleadings, be tried on their merits in a plenary trial, where the plaintiff Mrs. Kruse and her counsel can confront and cross-examine adverse witnesses. *Goldberg v. Kelly*, 397 U.S. 254, 269; 25 L.Ed. 2d 287 (1970); *Green v. McElroy*, 360 U.S. 474, 496-397; 3 L.Ed. 2d 1377 (1959).

Therefore, unless and until there has been a valid dismissal of the complaint, or granting of a valid motion for summary judgment, it is a denial of due process to conduct a trial on affidavits of the merits of the factual issues framed by the pleadings to establish the falsity of factual allegations of the complaint, and then impose Rule 11 sanctions for supposedly false and frivolous factual allegations. *Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1987) where the Court holds:

> "Our holding that the summary judgment in favor of defendants must be reversed compels us also to reverse the imposition of sanctions against plaintiff's counsel under Rule 11. Although the timing of sanctions rests in the discretion of the trial judge, 'it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation ...' ..." (Id. at 1555)

Moreover, even if the Court modifies or distinguishes *Pulliam* to extend judicial immunity and affirm the dismissal of the state Justices and Courts on that basis; this will not cure the violation of due process, or retroactively validate the imposition of Rule 11 sanctions on the theory of the previous erroneous dismissal of the complaint being cured by the later valid dismissal. Such an erroneous dismissal cannot deprive a litigant or counsel of a fundamental right, such as due process or trial by jury (*Lytle v. Household Mfg., Inc.*, 110 S.Ct. 1331, 1337 (1990)) and the Justices would not have been sued if *Pulliam* had not been the controlling law at the time.

VII. The Court Should Exercise Its Supervisory Power To Vacate The Rule 11 Sanctions On The Additional Ground That The Doctrine Of Unclean Hands Is A Bar To Recovery Of Deliberately Inflated And Excessive Attorney's Fees And Costs

We submit the Court should exercise its supervisory power to establish the rule that abuse of sanctions procedures will not be tolerated, and unclean hands will bar recovery of sanctions. There is precedent for this position.

In California, a code pleading state where the law and equity sides of the courts have long been merged, as they have in the federal system, it is recognized that unclean hands is a defense in

legal actions, as well as those in which equitable relief is sought. *Pond v. Insurance Co. of North America* (1984) 151 Cal. App. 3d 280, 289-290. In *Los Angeles Memorial Coliseum Commission v. NFL*, 791 F.2d 1356 (9th Cir. 1986) the Court held that where both parties to a contract breach the implied promise of good faith and fair dealing with respect to the same affair, incident or transaction, and both breaches concern the same episode in the parties' relationship; then the claims nullify each other so that neither party can recover for the breach, citing *Pond v. Insurance Co. of North America*, *supra*, for the proposition that unclean hands applies to actions at law as well as suits in equity. (Id. at 1362)

In *Mossman v. Roadway Express, Inc.*, 789 F.2d 804 (9th Cir. 1986) the Court holds that if misconduct of the attorney moving for sanctions, increases the amount of attorney's fees incurred to resist a frivolous motion or pleading by the other side, such increase must be deducted from the amount of sanctions to which the moving party would otherwise be entitled. (Id. at 806) *Mossman* was cited and relied upon to make the same holding in *In Re Yagman*, 796 F.2d 1165, 1185 (9th Cir. 1986). We submit that if the Ninth Circuit's later decision in *L.A. Coliseum v. NFL*, *supra*, is engrafted upon the holdings in *Mossman* and *Yagman*, those authorities support the proposition that unconscionable inflation of attorney's fees with the intent to recover those as a Rule 11 sanctions award of a reasonable attorney's fee, is an abuse of the judicial process, which constitutes unclean hands barring any recovery of sanctions.

Recent concern over unfairness in imposition of Rule 11 sanctions, and chilling of zealous or innovative advocacy, resulted in a year long investigation, and proposed amendments to Rule 11, by the Advisory Committee. Particularly in this context and at this time, we submit that the doctrine of unclean hands should be recognized as a bar to recovery of sanctions by a party whose counsel deliberately inflate fees and costs to attempt to mislead the Court into awarding excessive sanctions.

In the present case this is precisely what happened. The record shows that after the District Judge's June 18, 1990 order was issued, denying reconsideration of the dismissal order and awarding sanctions in the amount of the defendants' attorneys fees and costs (App. 32) defense counsel applied for over $264,000 in such fees and costs, $224,000.72 of which was claimed by Orrick, Herrington & Sutcliffe, counsel for Justice Newsom (App. 38) as contrasted to only $25,256.78 claimed by counsel for Justice Racanelli (App. 37)

and $15,181.45 claimed by counsel for the Court of Appeal. (App. 37)

Attorney Watson objected to the nearly quarter million dollars fees and costs applied for by counsel for Justice Newsom, based on 832 hours time billed, as outrageous and unconscionable, for merely handling a motion to dismiss and a motion for sanctions, particularly since it was counsel for the Bank and the other private party defendants (i.e., the Farella, Braun law firm) that had filed the first motion to dismiss, on grounds of bars of res judicata and Rooker-Feldman, and counsel for the other defendants, including the Orrick firm, had done essentially nothing more than incorporate by reference the Farella, Braun points and authorities, in support of their own later-filed motions to dismiss.

That written objection further pointed out that in *Real v. Continental Group, Inc.*, 653 F.Supp. 736 (N.D. Cal. 1987) a different District Judge of the District Court had earlier strongly criticized and rejected a major portion of the Orrick law firm's application for fees and costs in that case, noting that "This case was overstaffed and the hours billed are 'excessive, redundant or otherwise unnecessary'...." (Id. 738-741)

The Orrick firm has just recently again been strongly criticized, this time by the California trial and appellate courts, for abuse of the judicial process, by willfully and wrongfully multiplying the cost and expense of litigation for its own financial gain, and to thus attempt to prevail for the client, not on the merits, but rather by bringing about financial ruin of the adversary parties. *International Insurance Company v. Montrose Chemical Corporation of California* (2d Dist. 1991) 231 Cal.App. 3d 1367, 1373-1375.

The Orrick firm responded to the objection by filing a declaration stating the attorneys fees and costs were all reasonable and necessarily incurred. However, in her August 22, 1990 order (App. 36) the District Judge found that the fees applied for by the Orrick firm "amounted to overkill" because they were the result of "heavy staffing", using a team of 22 persons, consisting of a "cadre of 5 partners, 4 associates, 4 law clerks, 8 paralegals, a library staff and a private investigator", and having those persons confer with one another and duplicate the same work. (App. 37-38) However, the District Judge then merely reduced the $224,000.72 by an arbitrary 20% as to the time of the principal attorneys, and by elimination of some of the time of the other 22 persons on the team, to arrive at an arbitrary deduction of $57,963.25, to reduce the $224,000.72 to $166,037.47. (App. 38) But no explanation was

given as to how or why the Judge fixed upon an arbitrary 20% reduction, or why the arbitrarily reduced amount of $166,037.49 would not still represent an outrageous and totally unreasonable number of hours for merely handling two motions. (App. 38)

We submit that the fees and costs applied for by the Orrick firm as sanctions in this case, were deliberately and unconscionably inflated charges which Justice Newsom knew he was improperly certifying to the State for payment, and that the District Judge's order conclusively establishes that at least $57,963.25 was overcharged to, and paid by, the State.

There is thus what we submit is proof that Justice Newsom betrayed the public trust reposed in him, by misusing his judicial office to improperly exercise his legal right under Cal. Gov. Code §§995-996, to have the State pay the attorneys' fees and costs for his legal defense in a lawsuit against him arising out of the performance of his judicial duties; and that he breached his trust by causing the State to pay what he knew to be grossly inflated, unreasonable and unconscionable amounts, intended to cause financial injury and discourage if not prevent Mrs. Kruse and her counsel seeking appellate review.

A. The Sanctions Award Violates The Legal Limitations On The Total Amount Of Sanctions Which May Properly Be Imposed

The unconscionable conduct and unclean hands of Justice Newsom and his counsel are further demonstrated by the magnitude of inflation of the fees.

The law is settled that even in a case where it is clear that Rule 11 sanctions must be imposed for filing of an indisputably frivolous complaint; it is still an abuse of discretion and reversible error for a District Judge to impose sanctions upon attorneys in such amount as to "unfairly restrict their access to the courts or otherwise curtail their ability to practice law or to cause them great financial distress." *In Re William M. Kunstler*, 914 F.2d 505, 524 (4th Cir. 1990) (emphasis added). It is even more egregious error to impose sanctions in such great amount as "will bankrupt the offending parties or force them from the future practice of law". (Ibid.) Accord: *Doering v. Union County Board*, 857 F.2d 191, 196 (3d Cir. 1988). This is so because "the least severe sanctions adequate to serve the purposes of Rule 11 should be imposed". *Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir. 1987); Schwarzer, "Sanctions Under The New Federal Rule 11", 104 F.R.D. 181, 201, citing

Industrial Building Materials, Inc. v. Interchemical Corp., 437 F.2d 1336, 1339 (9th Cir. 1970).

The reason for limiting sanctions to the minimum amount necessary to deter future similar conduct, is that the purpose of Rule 11 is to deter filing of frivolous pleadings, not to shift attorneys' fees. *Cooter & Gell v. Hartmarx Corp.*, 496 US ____; 110 L.Ed 2d 359, 374 (1990) ["It is now clear that the central purpose of Rule ll is to deter baseless filings..."]; *In re Kunstler*, *supra*, 914 F.2d at 522-523, ["the amount of a monetary sanction should always reflect the primary purpose of deterrence."]

The attorney resisting a motion for Rule 11 sanctions has the burden of proving the amount of sanctions sought exceeds his or her ability to pay. *In Re Kunstler*, *supra*, 914 F.2d at 524. Attorney Watson sustained this burden by advising the District Court in a pleading, that while he was formerly a partner in law firms, he was now a sole practitioner and sanctions in even a much lesser amount than those being requested, would force him into bankruptcy reorganization in order to maintain working capital and cash flow necessary to continue operation of his law office and practice and to support himself and his family, and to avoid wiping out of their lifetime savings and retirement assets, which cannot readily be replaced by attorney Watson, age 66, and his wife, age 59.

VIII. The Court Of Appeals Imposed Sanctions On Appeal In Violation Of Due Process Requirements

The Court imposed double costs under FRAP 38, as sanc tions for a frivolous appeal (App.3), meaning an appeal where the result was obvious, or the argument was wholly without merit. *McConnell v. Critchlow*, 661 F.2d 116, 118 (9th Cir. 1981). More recently the same Court has awarded attorneys fees as additional sanctions for frivolous appeal. (App. 60)

Before sanctions are imposed upon an attorney by a trial or appellate court, procedural due process requires that the court specify the grounds of complaint against the attorney, and give notice and opportunity to be heard in opposition to sanctions. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 354-355, 20 L.Ed. 646 (1871) [trial court]; *Braley v. Campbell*, 832 F.2d 1504, 1513-1515 (10th Cir. 1987) [appellate court]. These requirements are also imposed to make a record to facilitate informed appellate review by this Court. *Braley*, *supra*, 832 F.2d at 1513. Therefore, the Court of Appeals has imposed sanctions for a frivolous appeal, without (1) specifying the arguments of error which were found to

be frivolous, (2) stating the reasons for so finding, and (3) thereafter granting opportunity to file a brief in opposition before sanctions were imposed.

Mrs. Kruse and her counsel were denied this fundamental fairness and right, despite having requested that we be so advised and given opportunity to respond by brief, before the most recent appellate sanctions were imposed. We respectfully submit that the Court of Appeals cannot specify any arguments made on appeal that were without merit, when the appeals arise out of an order of dismissal based on the absolute and contrived fiction that the California Supreme Court's order denying appellate review and refusing to assume jurisdiction, was a res judicata decision on the merits of the federal questions raised in the petition for review. Neither counsel for respondents, nor the District Judge, nor the Circuit Judges have ever presented any authority supporting the proposition on which the dismissal order is rested.

Accordingly, we submit there is compelling need and justification for this Court's exercise of its supervisory power to correct error in the lower courts; allow Mrs. Kruse to seek redress for alleged subversion of justice; and prevent her counsel being forced into bankruptcy by erroneous sanctions imposed by a District Judge who has three times before been reversed for erroneous imposition of sanctions. Mossman v. Rodeway Expreess, Inc., 789 F.2d 804, 806 (9th Cir. 1986); *Hudson v. Moore Business Forms, Inc.*, 836 F.2d 1156, 1160-1162 (9th Cir. 1987); and *Jensen Electric v. Moore, Caldwell, etc.*, 873 F.2d 1327, 1329-1332 (9th Cir. 1989).

Dated: March 10, 1992 Respectfully submitted,

FREDERICK E. WATSON
1475 N. Broadway
Suite 390
Walnut Creek, CA 94596
(510) 947-0393
Counsel of Record

Frederick E. Watson
Petitioner in Pro Se

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IRENE O'CONNELL KRUSE,	)	No. 90-16133
	)	
Plaintiff-Appellant,	)	D.C. No. CV-89-1440-MHP
v.	)	
	)	MEMORANDUM*
COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, WILLIAM A. NEWSOM; JOHN T. RACANELLI, in their individual and official capacities as members of Division One of the said Court of Appeal; SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SONOMA; WINSLOW CHRISTIAN; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; LELAND PARACHINI, STEINBERG FLINN, MATZGER & MELNICK; DAVID B. FLINN,	)	[Filed October 24, 1991]
	)	
Defendants-Appellees.	)	

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

IRENE O'CONNELL KRUSE,	)	No. 90-16444
	)	
Plaintiff,	)	D.C. No. CV-89-1440-MHP
and	)	
	)	
FREDERICK WATSON	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, WILLIAM A. NEWSOM; JOHN T. RACANELLI, in their individual and official capacities as members of Division One of the said Court of Appeal; SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SONOMA; WINSLOW CHRISTIAN; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; LELAND PARACHINI, STEINBERG FLINN, MATZGER & MELNICK; DAVID B. FLINN,	)	
	)	
Defendants-Appellees.	)	
	)	
IRENE O'CONNELL KRUSE,	)	No. 90-15201
	)	
Plaintiff-Appellant,	)	D.C. No. CV-89-1440-MHP
v.	)	

COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, WILLIAM A. NEWSOM; JOHN T. RACANELLI, in their individual and official capacities as members of Division One of the said Court of Appeal; SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SONOMA; WINSLOW CHRISTIAN; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; LELAND PARACHINI, STEINBERG FLINN, MATZGER & MELNICK; DAVID B. FLINN,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Marilyn Hall Patel, District Judge, presiding

Argued and Submitted September 13, 1991
San Francisco, California

Before: GOODWIN, SCHROEDER, and NOONAN,
Circuit Judges

The appellants' motion for leave to file a late Amended Reply Brief is granted.

We affirm the judgment and the imposition of sanctions for the reasons stated by the trial judge in her memorandum and orders below. Furthermore, we award double costs on appeal pursuant to 28 U.S.C. § 1912 and Fed. R. App. P. 38.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IRENE O'CONNELL KRUSE, Plaintiff-Appellant, v. COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, WILLIAM A. NEWSOM; JOHN T. RACANELLI, in their individual and official capacities as members of Division One of the said Court of Appeal; SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SONOMA; WINSLOW CHRISTIAN; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; LELAND PARACHINI, STEINBERG FLINN, MATZGER & MELNICK; DAVID B. FLINN, Defendants-Appellees.	No. 90-16133 D.C. No. CV-89-1440-MHP ORDER [Filed December 12, 1991]

IRENE O'CONNELL KRUSE,	)	No. 90-16444
	)	
Plaintiff,	)	D.C. No. CV-89-1440-MHP
and	)	
	)	
FREDERICK WATSON	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, WILLIAM A. NEWSOM; JOHN T. RACANELLI, in their individual and official capacities as members of Division One of the said Court of Appeal; SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SONOMA; WINSLOW CHRISTIAN; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; LELAND PARACHINI, STEINBERG FLINN, MATZGER & MELNICK; DAVID B. FLINN,	)	
	)	
Defendants-Appellees.	)	
	)	
IRENE O'CONNELL KRUSE,	)	No. 90-15201
	)	
Plaintiff-Appellant,	)	D.C. No. CV-89-1440-MHP
v.	)	

COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, WILLIAM A. NEWSOM; JOHN T. RACANELLI, in their individual and official capacities as members of Division One of the said Court of Appeal; SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SONOMA; WINSLOW CHRISTIAN; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; LELAND PARACHINI, STEINBERG FLINN, MATZGER & MELNICK; DAVID B. FLINN,

Defendants-Appellees.

Before: GOODWIN, SCHROEDER, and NOONAN, Circuit Judges

Appellant's motion for leave to file supplemental brief in support of petition for rehearing is GRANTED.

The petition for rehearing is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IRENE O'CONNELL KRUSE, Plaintiff, -vs.- COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT; JUSTICES WILLIAM A. NEWSOM AND JOHN RACANELLI; THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SONOMA; WINSLOW CHRISTIAN, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION; LELAND, PARACHINI, STEINBERG FLINN, MATZGER & MELNICK; and DAVID B. FLINN, Defendants.	)	No. C-89-1440 MHP MEMORANDUM AND ORDER [Filed August 21, 1989]

Plaintiff filed this action under the Civil Rights Act of 1871, 42 U.S.C. § 1983, alleging violations of her constitutional rights by defendants acting under color of state law. Plaintiff seeks declaratory and injunctive relief from defendant state courts and justices, and money damages from the private party defendants (the Bank of America and attorneys). The matter is now before the court on motions by all defendants to dismiss the action and for sanctions. Having considered the arguments of the parties, for the reasons stated herein, the court finds that it is wholly without jurisdiction to entertain plaintiff's action. Accordingly, the court grants defendants' motions to dismiss and dismisses the action without prejudice. The motions for sanctions are taken under

submission. In connection with the sanctions motion, plaintiff's counsel is to file a declaration within thirty (30) days of the filing of this order. The declaration shall detail what investigation was undertaken into the factual allegations of the complaint prior to its filing, with particular attention to investigation supporting the allegations in paragraphs 24.2 through 30 and paragraphs 38 through 50. Defendants' counsel shall have two weeks from the filing of the declaration to respond.

BACKGROUND

This action arises out of a lawsuit brought by plaintiff Irene O'Connell Kruse in California state court (the "O'Connell case"), alleging state law claims under a "lender liability" theory against Bank of America. In that action, plaintiff alleged that she was fraudulently induced to transfer a controlling interest in her family's apple-processing business, the James E. O'Connell Company, by the Bank's false representations that it would provide long-term financing to the company. She brought claims against the Bank for fraud, intentional interference with prospective economic advantage and intentional infliction of emotional distress.

On July 19, 1985, after a jury trial, a verdict awarding plaintiff over nine million dollars in compensatory and punitive damages was rendered in the Superior Court for Sonoma County. The trial judge denied the Bank's motion for a new trial on the condition that plaintiff accept a remittitur reducing punitive damages, which she did.

The Bank appealed to the California Court of Appeal. On May 18, 1988, a panel of the Court of Appeal consisting of Justices Newsom, Racanelli and Elkington reversed the judgment for plaintiff. Plaintiff filed for rehearing and requested the disqualification of Justices Newsom and Racanelli on conflict of interest grounds. On June 17, 1988, the Court of Appeal denied rehearing and filed a modified opinion affirming the reversal. The petition for disqualification of Justices Newsom and Racanelli was denied.

Plaintiff appealed to the California Supreme Court, which denied review on September 1, 1988. In her petition, as in this

case, plaintiff claimed that the Court of Appeal had violated her rights to equal protection and due process under the Fourteenth Amendment by failing to render a fair, just and impartial decision. Plaintiff also filed a motion to take evidence and discovery, again alleging bias and conflict of interest on the part of Justices Racanelli and Newsom. In denying the petitions, the California Supreme Court stated that plaintiff had not made a prima facie case of bias, prejudice or denial of constitutional rights. Order Denying Review, Defendants' Appendix, Ex. 16.

Following the state Supreme Court's denial of review, plaintiff petitioned for certiorari at the United States Supreme Court, again alleging bias in the Court of Appeal panel and due process violations. Petition for Certiorari, Def. App. Ex. 21. The Supreme Court denied certiorari on January 19, 1989.

The crux of this case is contained in the first of plaintiff's four claims. She alleges that Justice Newsom, Justice Racanelli, the Bank of America and the Bank's attorneys conspired to deny her equal protection and due process of law in reversing the judgment she won at trial in her state action. Plaintiff claims the conspiracy arose from the Bank's "blackmail" and "bribery" of Justice Newsom. Plaintiff alleges that the Bank blackmailed Justice Newsom by threatening to reveal his alleged financial misconduct and bribed him by making loans Justice Newsom was unworthy to obtain. Plaintiff contends that Justice Newsom "persuaded" Justice Racanelli to participate in the decision reversing the O'Connell case.

Plaintiff's second claim is for "conspiracy coerced by duress" against the Bank and attorney defendants. In this claim, she alleges that even if Justice Newsom participated in the alleged conspiracy only under duress, the Bank and attorneys are nonetheless liable for "joint action with a state official in the subversion of the judicial process." First Amended Complaint at para. 66.

Plaintiff's third claim is for a deprivation of due process of law. Plaintiff claims due process was violated even if the justices did not conspire and were not unable to be fair, because "nevertheless the facts alleged are such that there was a reasonable appearance of such inability to be fair and impartial,

and that this constitutes a denial of due process which invalidates" the Court of Appeals decision. First Amended Complaint at para. 68.

Finally, plaintiff's fourth claim alleges a denial of due process and equal protection even if there was no actual conspiracy or inability to be fair and no reasonable appearance of such inability. She claims the Court of Appeal's "switching theories"[1] and failing to view the evidence in the light most favorable to the plaintiff denied her due process and equal protection.

Although plaintiff laces her complaint with allegations of conspiracy, most of her claims are nothing more than a frontal attack on the state court decisions. As explained below, to the extent her claims are based on conspiracy to violate her civil rights, they are barred by res judicata or collateral estoppel. Furthermore, those based on the Court of Appeal's standard of review are barred for lack of federal jurisdiction.

The array of relief sought by plaintiff is at least impressive in its imaginativeness. Plaintiff seeks compensatory and punitive damages against the Bank and its attorneys for their part in the alleged conspiracy. She further seeks "a declaration that Justices Newsom and Racanelli are biased in favor of the Bank and disqualified to sit on any appeals involving the Bank, and an injunction enjoining their practice of rendering biased and unjust decisions in favor of the Bank." First Amended Complaint at para. 9. With regard to defendants Superior Court for Sonoma County and the Court of Appeal for the First Appellate District, plaintiff seeks a declaration that the O'Connell appellate decision and subsequent remittitur are invalid, an injunction against "enforcement of that invalid decision," recall of the remittitur, a temporary restraining order and preliminary injunction preventing the Sonoma Superior Court and the Bank from conducting any further proceedings related to the remittitur, "a declaration that the Bank has unclean hands which bar any further prosecution of its appeal," or an injunction requiring assignment of the Bank's appeal and plaintiff's cross-appeal to another Division or District. Id. Finally, plaintiff seeks attorneys' fees and costs from the Justices, Bank and attorneys. Id.

The Sonoma Superior Court filed an answer to the complaint stating that it would not oppose an injunction barring further proceedings, but noting that such an injunction appears to be barred by the Eleventh Amendment to the United States Constitution, as well as by principles of equity, comity and federalism. All other defendants have moved to dismiss the complaint. In addition, defendant Justice Newsom moves to strike portions of the complaint under Federal Rule of Civil Procedure 12(f) and, in the event the motion to dismiss is denied, moves for summary judgment under Federal Rule 56. Defendants also move for sanctions against plaintiff's counsel under Federal Rule 11.

DISCUSSION

> It is the judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption.

Pierson v. Ray, 386 U.S. 547, 554 (1967).

It is with this established principle in mind that the court turns to discussion of the motions to dismiss.

A. Federal Review of State Court Judgments

Federal district courts may not review state court judgments, even when those judgments are alleged to be in violation of the United States Constitution. Rooker et al. v. Fidelity Trust Co., 263 U.S. 413, 416 (1923) (federal district court has no jurisdiction to review allegation that state judgment rendered in violation of due process, equal protection and contract clauses of federal constitution; District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 486-87 (1983) (no federal district court jurisdiction to review claim that Court of Appeals acted arbitrarily, capriciously, unreasonably or discriminatorily in denying petitioners for waiver of bar admission rule). Nor does the mere framing of allegations in terms of 42 U.S.C. § 1983 confer jurisdiction on the district courts to review state judgments.

Reynolds v. Georgia 640 F.2d 702, 707 (5th Cir. Unit B), reh'g denied, 645 F.2d 272, cert. denied, 454 U.S. 865 (1981).

This principle, known as the Rooker-Feldman doctrine, bars plaintiff's suit. Under the doctrine, although parties may appeal state court judgments to the state's highest court, and then to the United States Supreme Court if a federal constitutional question is presented, "horizontal" review of a state court judgment in federal court is not available. Rooker, 263 U.S. at 416. See also MacKay v. Pfeil, 827 F.2d 540, 543 (9th Cir. 1987) (federal courts "may not serve as appellate tribunals to review errors allegedly committed by state courts.")

Stripped of its hyperbole, the complaint in this action seeks one principal result: the resurrection of plaintiff's trial court victory and multimillion-dollar verdict. Plaintiff spins out accusation after accusation regarding conspiracy, bias and deprivation of her rights, but the heart of her complaint is her dissatisfaction with the Court of Appeal's reversal of her trial verdict. This was effected, she claims, by the Court of Appeal's "switching theories" and failing to review the evidence from the trial in the light most favorable to the verdict.

These claims to the heart of the Court of Appeal's decision on the merits of plaintiff's case, and the claims were properly presented to the California Supreme Court after the Court of Appeal denied rehearing. The notion that a federal district court may somehow compel a state court of appeals to adopt or conform to a particular standard of review in conducting its appellate review is absurd on its face and unsupported by any authority. This court has no jurisdiction to grant plaintiff the relief she unsuccessfully sought in her state court appeals.

California provides a perfectly adequate and appropriate remedy for disgruntled litigants. That remedy is the right of appeal, and both plaintiff and the Bank of America exercised their right to appeal this action. Plaintiff has had all the review to which she is entitled.

Plaintiff attempts to avoid the force of the Rooker-Feldman doctrine by claiming that she seeks review not of the merits of the state court action, but of the procedure by which she was denied a

fair and impartial panel. Her efforts are unavailing. Sunn v. Dean, 597 F. Supp. 79 (N.D. Ga. 1984), cited by defendants, is squarely on point. In that case, the federal district judge dismissed a civil rights complaint alleging conspiracy by jurors, a judge and state attorneys to deny plaintiff his constitutional rights to a fair trial, stating,

> This court further has no authority to decide constitutional issues which were raised, or reasonably could have been raised in the state court proceeding. All of plaintiff's allegations concerning the prejudice of the jury, the correctness of their verdict, the disparaging remarks by the trial judge, and the correctness of his rulings, could have been raised, and should have been raised, on direct appeal to the Georgia appellate courts. This court, therefore, has no jurisdiction or authority to consider any issues concerning the correctness of the judgment against plaintiff. Insofar as plaintiff's claims would require this court to reverse, vacate, or otherwise modify the judgment of the state court this court is without jurisdiction to hear them.

Id. at 80 (citations omitted). See also Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 25 (1987) (Marshall, J., concurring) ("[w]here federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment"); Rosquist v. Jarrat Constr. Corp., 570 F. Supp. 1206 (D.N.J. 1983) (relief including voiding of state court judgments for alleged judicial bias unavailable under Feldman).

Under the Rooker-Feldman doctrine, therefore, this court may not entertain plaintiff's claims regarding the "switched theories" allegations, since to do so would necessarily entail reviewing the correctness of a state court judgment. Accordingly, plaintiff's fourth claim is dismissed.

B. Res Judicata and Collateral Estoppel

Insofar as plaintiff's claims of judicial bias and conflict of interest, as well as her "switched theories" claims, are based on a claim of conspiracy to violate her civil rights, they are barred by

the doctrines of res judicata and collateral estoppel. The court will examine each in turn.

1. Res judicata

Res judicata "prevents litigation of all grounds for, or defenses to, recovery that were previously unavailable to the parties, regarding of whether they were asserted or determined in the prior proceedings." Robi v. Five Platters, Inc., 838 F.2d 318, 322 (9th Cir. 1988) (citation omitted).

To determine whether the same claim or cause of action is involved for the purpose of res judicata, California law looks to the "primary rights" theory. "[I]f two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake . . . ." Clark v. Yosemite Community College Dist., 785 F.2d 781, 784 (9th Cir. 1986) (quoting Eichman v. Fotomat Corp., 147 Cal. App. 3d 1170, 1174 (1983), opinion amended and superseded by Eichman v. Fotomat, No. 87-6532 (9th Cir., filed as amended July 13, 1989). A "primary right" is the "right to be free from the particular unlawful conduct." Clark, 785 F.2d at 784 (citation omitted).

The claims plaintiff brings here involve the identical "primary right" to be free from judicial bias she asserted in state court, and at the United States Supreme Court. Each was presented to the California Supreme Court in exhaustive detail in plaintiff's twenty-seven-page petition for review, Def. App. Ex. 1, her fourteen-page reply to the Bank's answer to the petition for review, Ex. 12, and her forty-eight page petition for rehearing after the Supreme Court's denial of review. Ex. 19. Her petition to the United States Supreme Court dealt principally with the judicial bias claim. Ex. 20.

Plaintiff states that her claims "are based upon the actions and conduct of the defendant Court of Appeal justices in conducting appellate review, and rendering decision on May 18, 1988 . . . ." Opp. to Bank's Motion at 14. She does not deny that the claims she advanced in state court of judicial bias, violations of equal protection and due process and "switching theories" all arose from these same actions and conduct. Instead, she attempts to avoid the inevitable res judicata effect of her prior litigation with a

novel, though unavailing, argument. Plaintiff contends that the prior proceedings did not constitute a "lawsuit" for res judicata purposes because she did not first press her claims in a trial court. No authority is cited for this sweeping proposition, and this court rejects it. The California Supreme Court had ample opportunity to review plaintiff's claims, which were all premised on the same primary right. That court's rejection of those claims is res judicata in this court.

2. Collateral estoppel

Collateral estoppel bars relitigation of issues decided in prior proceedings if: "'(1) the issue necessarily decided at the previous [proceeding] is identical to the one which is sought to be relitigated; (2) the previous [proceeding] resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at a prior [proceeding].'" People v. Sims, 32 Cal. 3d 468, 484 (1982) (quoting People v. Taylor, 12 Cal. 3d 686, 691 (1974)).

Plaintiff does not deny that the issues she seeks to litigate are so identical to those she raised in the California courts, save for the addition of the section 1983 label. Nor does she dispute that the third prong of the collateral estoppel test has been met. Instead, plaintiff contends that the California Supreme Court's denial of review was not a decision on the merits of her claims. In so asserting, plaintiff simply ignores the force of the Supreme Court's statement in denying her petition for review and her motion to take evidence (which gave the court yet another opportunity to review the same claims of bias and impropriety). The Supreme Court stated:

> The requests to take further evidence are DENIED because petitioners have not made a prima facia case showing of conflict of interest or bias, much less a deprivation of due process of law.

Order Denying Review, Def. App., Ex. 16.

As the California Supreme Court made clear in Sims, collateral estoppel does not require that an issue be tried; instead, "[a]n issue is actually litigated "[w]hen [it] is properly raised, by

the pleadings or otherwise, and is submitted for determination, and is determined . . . . A determination may be based on a failure of . . . proof . . . ." 32 Cal. 3d at 484 (quoting Restatement (Second) of Judgments § 27 comment d at 255 (1982)) (emphasis in Sims). The Supreme Court's decision denying review of plaintiff's claims was a determination that the petition represented an absolute failure of proof. It was therefore a decision on the merits. See Restatement (Second) of Judgments § 27 comment d at 255 (1982) (determination based on failure of proof suffices for preclusion); Richer v. Superior Court, 63 Cal. App. 3d 748, 756 (1976) (where statement of reasons given, denial of petition for writ was decision on the merits); Miofsky v. Superior Court, 703 F.2d 332, 336 (9th Cir. 1983) (summary denial of petition for writ of mandate is not decision on the merits unless reasons given.)[2]

Plaintiff's argument that because the Supreme Court's statement addressed only the sufficiency of her prima facie showing, it could not be a decision on the merits, is equally unpersuasive. Indeed, it is difficult to imagine a more forceful comment on the merits of a claim than to say it does not even rise to the level of a prima facie case. A prima facie case is established when the facts as pleaded, if true, make out a cognizable claim. A statement that no prima facie case has been made is virtually the strongest statement imaginable: even if every assertion in the pleading were true, no cause of action would lie. This is most assuredly a decision on the merits of a claim.

Plaintiff's statement that "the Court did not (and indeed could not) state that plaintiff would never acquire additional evidence in the future that would prove the justices were disqualified," Opp. to Bank's Motion at 23, reveals her lack of understanding of the basic legal principle of finality. The preclusive effect of a prior decision cannot be avoided by a proffer of new evidence. Evans v. Celotex Corp., 194 Cal. App. 3d 741, 748 (1987). This fundamental tenet prevents the very result plaintiff would achieve: endless litigation by losing parties asserting that new evidence required further review.

The court finds that plaintiff's claim of judicial bias and violations of due process and equal protection are barred by collateral estoppel, since those claims were asserted and rejected

in her petition for review to the California Supreme Court, which remarked that she had failed to make even a prima facie base of bias of conflict of interest.[3] Accordingly, even if the Rooker-Feldman doctrine (see Section A supra) did not bar this court's exercise of jurisdiction, plaintiff's claims against defendants Newsom, Racanelli, Bank, Christian, Flinn, and the Leland firm are barred by res judicata and/or collateral estoppel.[4]

C. Court Defendants

Because the court grants the motions by defendants Justice Newsom, Justice Racanelli, Christian, Flinn, Leland firm, and Bank to dismiss the action, the court also dismisses the claims against the Superior Court for Sonoma County and the Court of Appeal. No claims of wrongdoing have been brought against the court defendants, and under the Rooker-Feldman doctrine, this court is without jurisdiction to grant the declaratory and injunctive relief plaintiff seeks, even if plaintiff's claims against the non-court defendants were meritorious. See Rooker, 263 U.S. at 416; Feldman, 460 U.S. at 487.

D. Defendants' Motions for Sanctions

Federal Rule of Civil Procedure 11 states that the "signature of an attorney or party constitutes a certificate by the signer that . . . to the best of the signer's knowledge, information, and belief formed after reasonable injury, [the pleading] is well grounded in fact" and allows the opposing party to move for sanctions upon violation of the Rule.

In this case, the court shares defendants' concern for whether plaintiff's counsel conducted a reasonable inquiry into the facts supporting the serious allegations in the complaint before filing this action. The court is particularly concerned where an attorney makes contumelious assertions against a judge in an effort to attack an unfavorable decision rendered by the judge. Because such allegations attack the integrity of the judicial system as well as the judge, an attorney must be scrupulous in his investigation and statement of the facts.

In this case, some of the facts alleged in the complaint have nothing to do with the judge's purported relationship with the

Bank of America. They relate to family and other dealings and they have been directly contradicted by the affected family members. Other matters asserted as fact have also been unequivocally refuted and the evidence submitted suggests that a responsible injury would have revealed the spuriousness of plaintiff's allegations. These rebuttal papers have not been considered in the court's disposition of the motion to dismiss, but are considered in determining the viability of the sanctions motion.

In accordance with the above discussion, the court takes the motion for sanctions under submission and orders plaintiff's counsel to submit, within thirty days of this order, a declaration detailing the investigation counsel conducted before filing suit. The declaration shall detail, in particular, what investigation counsel undertook with relation to paragraphs 24.4 through 30 and paragraphs 38 through 50 of the complaint. Defendants may file a response to this declaration within fifteen days of its filing.

CONCLUSION

This court has no jurisdiction to overturn state court judgments. In addition, each of plaintiff's claims is barred by res judicata and/or collateral estoppel. Accordingly, the court DISMISSES the action with prejudice. The motions for sanctions are taken under submission. Plaintiff's counsel is to submit within thirty (30) days a declaration in accordance with the court's instructions in Section D supra. Defendants may respond to the declaration within fifteen (15) days of its filing.

IT IS SO ORDERED.

Dated: August 21, 1989

MARILYN HALL PATEL
United States District Judge

ENDNOTES

1. In explaining her "switching theories" allegation, plaintiff states that the Court of Appeal "deliberately review[ed] and revers[ed] plaintiff's judgment on legal theories different from the legal theories on which she recovered that judgment in the trial court." First Amended Complaint at para. 4. Even if violations of California judicial procedure could be adjudicated in a federal civil rights action, however, which they cannot, this "switched theories" claim would still be meritless. The California Court of Appeal has inherent power to decide any issue necessary to proper disposition of a case. See In re Marriage of Smith, 79 Cal. App. 3d 725, 744 n. 6 (1978) ("an appellate court, however, may consider any point proper disposition of the case appears to require, whether taken by counsel or not;") Burns v. Ross, 190 Cal. 269, 275-76 (1923) ("This court is undoubtedly at liberty to decide a case upon any points that its proper disposition may seem to require, whether taken by counsel or not.")

2. Plaintiff cites People v. Triggs, 8 Cal. 3d 884, 890 (1973), which states:

> Preliminary we declare that our refusal to grant a hearing in a particular case is to be given no weight insofar as it might be deemed that we have acquiesced in the law as enunciated in a published opinion of a Court of Appeal when such opinion is in conflict with the law as stated by this Court.

The quoted passage, however, like the Advisory Comment to California Rule of Court 29 cited on page 19 of plaintiff's Opposition to the Bank's motion, does not advance plaintiff's argument. The quoted discussion does not state that a denial of review is not res judicata or collateral estopped as to the claims, issues, and parties in the action in which review was denied; instead, it goes to the precedential value of the Superior Court's action. Indeed, plaintiff's argument that a Supreme Court denial of review cannot be res judicata or have collateral estoppel effect proves far too much: if it were true, no action would ever be final unless and until a full hearing were granted in the Supreme Court. This is not and has never been the law.

unless and until a full hearing were granted in the Supreme Court. This is not and has never been the law.

3. The court rejects plaintiff's argument that the Supreme Court's comment regarding plaintiff's failure to make a prima facie case applies only to plaintiff's motion to take evidence and not to her petition for review. The same arguments were made in both the motion and the petition. The Court rejected each in the same order. It defies common sense to believe that the Court's order should be read as deciding that no prima facie case of bias or conflict had been made out on the motion to take evidence, but expressing no opinion on the strength of the identical evidence and arguments in the petition for review.

4. Even if plaintiff, in her state court action, had not already brought each identical claim she now seeks to assert against each defendant, she would still be barred by res judicata and collateral estoppel. As discussed in section B(1) supra, res judicata applies "if two actions involve the same injury to the plaintiff and the same wrong by the defendant[s] . . . even if in the second suit the plaintiff pleads different theories, . . . seeks different forms of relief and/or adds new facts." Clark v. Yosemite Community College Dist., 785 F.2d 781, 784 (9th Cir. 1986) (quoting Eichman v. Fotomat Corp., 147 Cal. App. 3d 1170, 1174 (1983)). Because plaintiff complains of the deprivation of the same right, her right to a fair appellate panel, and the same injury, loss of her trial verdict, she is barred from relitigating new theories related to those same "primary rights."

APPENDIX D

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IRENE O'CONNELL KRUSE Plaintiff, -vs.- COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, et al., Defendants.	)	No. C-89-1440 MHP **MEMORANDUM AND ORDER** [Filed June 18, 1990]

Plaintiff Irene O'Connell Kruse originally filed this action under the Civil Rights Act of 1871, 42 U.S.C. § 1983, alleging that defendants, acting under color of state law, had violated her constitutional rights. Although plaintiff's complaint was rife with allegations of conspiracy, in essence the relief plaintiff sought was to have this court overturn the state court's judgment. In an order dated August 21, 1989 this court presented a detailed and exhaustive analysis of plaintiff's claims, finding that the court was without jurisdiction to grant plaintiff the requested relief. Nonetheless, plaintiff has now filed a motion for reconsideration. The court had also taken under submission and requested additional submissions on defendants' motion for sanctions. Defendants have requested additional sanctions on plaintiff's latest declaration. Having considered the submissions of the parties, for the following reasons the court denies plaintiff's motion for reconsideration and grants defendant's motion for sanctions.

BACKGROUND

The background of the underlying action is set out fully in the court's order of August 21, 1989, and therefore only the facts pertinent to the present motion will be noted here. Plaintiff received a verdict in Sonoma County Superior Court awarding her

over nine million dollars in compensatory and punitive damages. A panel of the Court of Appeal reversed plaintiff's judgment. Plaintiff's subsequent request for a rehearing was denied, as was her request that two of the justices from the appeal court panel be disqualified on conflict of interest grounds.

The California Supreme Court denied plaintiff's petition for review and her motion to take evidence and discovery, stating that plaintiff had no made a prima facie case of bias, prejudice or denial of constitutional rights. Plaintiff then filed a petition for certiorari with the United States Supreme Court alleging bias and a denial of due process. The Supreme Court denied certiorari.

Dissatisfied with the justice dispensed by these numerous tribunals, plaintiff then brought an action in this court alleging violations of her constitutional rights under the Civil Rights Act of 1871, 42 U.S.C. § 1983. The court determined that because plaintiff was attempting to have this court overturn the state court decision, this court was "wholly without jurisdiction to entertain plaintiff's action." Order at p. 2. The bases of the court's decision were (1) to the extent that Kruse's complaints were based on the Court of Appeal's standard of review, the Rooker-Feldman doctrine, precludes review by this court; and (2) to the extent that Kruse's claims were based on an alleged conspiracy to violate plaintiff's civil rights, they were barred by res judicata or collateral estoppel. See Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 486-87 (1983).

DISCUSSION

I. Plaintiff's Motion for Reconsideration

Federal Rule of Civil Procedure 59(e) governs motions for reconsideration. Mir v. Fosburg, 646 F.2d 342, 344 (9th Cir. 1980); Fed. R. Civ. P. 59(e). A motion brought under Rule 59(e) should be denied when the moving party presents no arguments which were not raised at the prior hearing. Backlund v. Barnhart, 778 F.2d 1386, 1388 (9th Cir. 1985). Thus plaintiff cannot prevail on her reconsideration motion unless she presents new arguments.

A motion for reconsideration may be proper where the court must correct manifest errors of law or fact. In the present case, however, plaintiff's motion is based exclusively on misstatements and misunderstandings of: (1) this court's conclusions during the August 14 hearing and in the August 21 order; (2) the Rooker-Feldman doctrine; and (3) the principles of collateral estoppel and res judicata.

In the reconsideration motion, plaintiff alleges that this court failed to properly consider her due process claim. The grounds for plaintiff's allegation are misconstructions of this court's conclusions at the hearing at its subsequent order. At the hearing the court stated that "all of the underlying facts, allegations, [of plaintiff's federal court complaint] are the same [as plaintiff's state court complaints]. And they were heard, and they were rejected by the California Supreme Court. . . ." Pl. Reconsideration Memo at 3.

Somehow plaintiff interprets this statement as a holding by the court that plaintiff's conspiracy claim was not presented to or determined by the California Supreme Court. In fact, this court held that because plaintiff's conspiracy claim was based on the same issues and factual allegations underlying her state law claims, plaintiff's claim here was barred by the doctrines of res judicata and collateral estoppel.

Plaintiff's further basis for requesting reconsideration is grounded on a misconception of the Rooker-Feldman doctrine. Despite plaintiff's lack of confidence, this court did correctly understand plaintiff's claims regarding it's power in relation to state courts. Plaintiff asserts that the Rooker-Feldman doctrine does not bar this court from "requir[ing] that each state court of appeal uniformly fairly and equally apply the same adopted standard of appellate review in all appeals coming before it." PL. MPA at 9.

However, this court is precluded from deciding whether the state Court of Appeal applied appellate review standards "with an equal hand." Allah v. Superior Court, 871 F.2d 887, 891 (9th Cir. 1989). Federal courts "do not have jurisdiction over direct challenges to final decisions of state courts, even if those challenges allege that the state court's action was unconstitutional.

This rule applies even though the direct challenge is anchored to alleged deprivations of federally protected due process and equal protection rights." Id. at 890-91 (citations omitted).

Miofsky v. Superior Court, 703 F.2d 332 (9th Cir. 1983), relied on by plaintiff, was decided prior to the Supreme Court's decision in Feldman and is no longer the law in the Ninth Circuit as applied to section 1983 actions. Worldwide Church of God v. McNair, 805 F.2d 888, 893 n.4 (9th Cir. 1986).

Plaintiff's next argument for reconsideration is that this court erred in finding that the California Supreme Court's decision was a final adjudication on the merits. The California Supreme Court denied plaintiff's petition for discretionary review explicitly stating that the reason for its denial was plaintiff's failure to "make a prima facie showing of conflict of interest, or bias much less a deprivation of due process of law." Order at 14. Plaintiff argues that this denial and its accompanying statement of the reason for denial do not constitute a decision on the merits. Plaintiff's argument flies in the face of established legal authority.

Denial of a petition for appellate review is determined to have been on the merits where the court provides the reasons for its denial. Consumer Lobby Against Monopolies v. Public Utilities Commission, 25 Cal. 3d 891, 901; Richer v. Superior Court, 63 Cal. App.3d 748, 756 (1976). The California Supreme Court, by stating outright that plaintiff failed to make a prima facie showing, clearly addressed the merits of plaintiff's claim. The discretionary nature of the review process is irrelevant. Miofsky v. Superior Court, 703 F.2d 332, 336 (9th Cir. 1983) (denial of writ of mandate is given preclusive effect where "it affirmatively appears that the denial was intended to be on the merits.")

Finally, plaintiff attempts to assert that she was not accorded a full and fair hearing on the merits of her constitutional claims and therefore neither the Rooker-Feldman nor res judicata principles should apply. First, the application of res judicata does not require that the court below allowed for discovery or a full evidentiary hearing. Garcia v. Superior Court, 156 Cal. App. 3d 670, 677-78 (1984). Only minimum federal due process requirements need be satisfied. Kremer v. Chemical Construction Corp., 456 U.S. 461, 484-85 (1982). Furthermore plaintiff's

claim was reviewed by the California Supreme Court and plaintiff exercised her option to file a petition for certiorari to the United States Supreme Court.

Plaintiff's reliance on Robinson v. Arivoshi, 753 F.2d 1468 (9th Cir. 1985) vacated on other grounds, 477 U.S. 902 (1986) is based on a misconstruction of the facts of that case. In Robinson the Hawaii Supreme Court never considered the federal constitutional claims, whereas in the present case, although they were rejected, plaintiff's federal constitutional claims were considered by the California Supreme Court.

II. Defendants' Motion for Sanctions

Along with their earlier motions the defendants requested that sanctions be imposed on plaintiff's attorney. In its order of August 21, 1989, the court explained that it shared defendants' concerns that plaintiff's attorney had not made sufficient investigation to support such contumelious assertions. The court required plaintiff's counsel to submit a declaration detailing the investigation undertaken prior to filing suit. The court has now reviewed the declaration of plaintiff's attorney, Frederick Watson, and the accompanying papers of counsel for both plaintiff and the defendants. Defendants have also requested additional sanctions based on attorney Watson's declaration.

A. Legal Standard for Sanctions

Federal Rule of Civil Procedure 11 requires that all pleadings, motions, and other papers filed with the court be, to the best of the attorney's knowledge, information and belief after reasonable inquiry, "well grounded in fact." Fed. R. Civ. P. 11. The attorney's signature on the papers signifies a warranty that it is not "interposed for any improper purpose, such as to harass. . . ." Id. If the attorney fails to comply with these requirements, the court must impose sanctions against the attorney, represented party, or both. Id. (emphasis added).

Plaintiff's counsel attempts to frame the legal standard for awarding sanctions as one where "the facts discovered by counsel of plaintiff, and the reasonable inferences to be drawn therefrom, must give rise to a reasonable suspicion that the claim to be

asserted will be found to be factually supportable after reasonable discovery has been allowed." Pl. Sanctions Memo. at 1-2. However, the authority cited in Mr. Watson's own memorandum contradicts his asserted understanding of the legal standard. The court in Jensen Electric Co. v. Moore, Caldwell, Rowland & Dodd, 873 F.2d 1327 (9th Cir. 1989) stated that a complaint is not frivolous if it is "well-grounded in fact." Id. at 1329 (quoting Greenburg v. Sala, 822 F.2d 882, 887 (9th Cir. 1987). There is a substantial difference between something being "well-grounded in fact" and something which is the product of a suspicion drawn from an inference deduced from a fact.

This court, like the Jensen court, is concerned with the reasonableness of the inquiry conducted by plaintiff's counsel. See Jensen, 873 F.2d at 1330; Rachel v. Banana Republic, 831 F.2d 1503, 1508 (9th Cir. 1987) (attorney has affirmative duty of investigation as to law and fact prior to filing). Moreover, the gravity of the charges made by Mr. Watson requires a more rigorous standard of inquiry. MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 505 (9th Cir. 1986) ("A complaint filed in federal court is not a vehicle for airing rumor, suspicion, or mere hostility.") Plaintiff's counsel cannot insulate himself from liability by citing to some minuscule amount of "inquiry," which is in fact fraught with hearsay and double hearsay problems, from which he has drawn inferences amounting to flights of fancy which no court could hold were reasonable. See Schwarzer, Sanctions Under the New Federal Rule 11 - A Closer Look, 104 F.R.D. 181, 187 (1985) ("facts adduced "must consist of admissible evidence or at least be calculated to lead to such evidence.") The Ninth Circuit's stated reluctance to impose sanctions for "factual errors" cannot justify Mr. Watson's unsupported ad hominem attacks which, were they not couched in terms of a complaint, might be the basis for a libel suit. Jensen, 873 F.2d at 1330.

B. Watson's Accusations

This court is astounded by the breadth and number of times Mr. Watson makes accusations of perjury, bribery, conspiracy, embezzlement and blackmail without any factual basis and continues to do so even within his present declaration, which is

supposed to provide this court with the factual basis for his prior accusations.

1. Assertions against Justice Newsom

The court will provide just a few examples of Mr. Watson's calumny. Mr. Watson has accused Bank of America of: (1) having "bribed" Justice Newsom by lending him $50,000 in 1980 (years prior to the plaintiff's suit against the Bank); and (2) of having "bribed" the Justice again by lending him an additional $50,00 in credit in 1987, which Watson alleges the Justice "desperately" needed but was not "creditworthy" to obtain rightfully.

Watson further accused Justice Newsom of having been blackmailed by attorney Flinn, who had purportedly "discovered" that the justice had "embezzled" money from his parents' estate. Most recently, Mr. Watson has added to the vitriol by accusing Justice Newsom of further violations of his duties as executor of his parents' estate and of having "removed" money from a family corporation to invest in a casino in Nevada.

Justice Newsom at the time of the summary judgment motion provided declarations from former business partners and from his siblings each of which unequivocally refutes Watson's allegations. Moreover, facts adduced by the defendants which were clearly available to Watson prior to filing his papers give lie to Watson's allegations.[1] Additionally, although Watson's papers are rife with serious allegations, he never contacted the very individuals most able to verify the "facts" he alleged.[2]

Nor do the papers submitted stand for the propositions for which Watson cites them. In support of his claim that Justice Newsom's behavior with respect to his family trust would amount to criminal embezzlement, Watson produces a mere three documents from the probate court. App. Exs. 10-12. None of these documents even intimates wrongdoing on the part of Justice Newsom.

2. Allegations of conspiracy among Bank of America, Attorney Flinn, the Leland Parachini Firm, Winslow Christian and Justice Newsom

As noted above, Watson has accused defendants of conspiring to obstruct justice. Attorney Watson tries to convince this court that the duty to adequately investigate accusations which impugn the integrity of individuals and of judges (and by extension of the judicial system), can be based on having "spoke[n] with a witness who had overheard attorney Flinn . . . in the next booth at a restaurant" or having "spoke[n] with a witness who was standing outside the house next door to William Sullivan's [branch manager of the Bank of America] home who heard . . . ." Watson Dec. at 6, 7-8. Mr. Watson's declaration does not provide the names or sworn affidavits of these individuals who just happen to be overhearing these conversations and who he ostensibly believes would attest under oath to the veracity of their eavesdropping.

Watson's "factual basis" was also grounded on William Lukens, Watson's colleague, having once told Watson that attorney Flinn had once told Lukens that Flinn represented the siblings of an unnamed judge who had been "caught in a very embarrassing situation that resulted in a very sensitive family dispute." This second-hand rumor was the foundation on which Watson constructed his entire embezzlement/blackmail sand castle.

Another purported "fact" on which Watson based his "reasonable suspicions" was a conversation with a former colleague of Mr. Flinn's, who had known Mr. Flinn for approximately one year and who purportedly stated that Mr. Flinn's philosophy was to "win at any cost." Watson Dec. at 8. From the mere opinion of an unnamed individual, who barely knows Mr. Flinn, Watson is willing to assert as "fact" any alleged misdeed he wishes.

Further, Watson examined both Mr. Sullivan and one of the other bank officers at trial, both of whom denied the substance of Mr. Watson's accusations. Nonetheless, without any substantiation whatsoever, Mr. Watson apparently thinks nothing of blithely asserting that Mr. Sullivan "did perjure himself." Id. at 7 (emphasis added). Perhaps Mr. Watson, despite his self-asserted competency and integrity,[3] believes that our legal system

permits an accusation to stand as the truth unless proven otherwise.

Mr. Watson's theories and accusations change to suit him. Early on in the proceedings Watson accused the three panelists on the Court of Appeal of "favoring" Bank of America in order to obtain "nomination to the federal bench or appointment to government positions, in a Dukakis administration" despite the fact that one of the justices was 85 years old at the time and a lifelong Republican. Newsom Memo at 2 n.1.

In his most recent filing, Watson's theory changes once again. Now, according to Watson,

> [t]he evidence which ultimately controlled [his] decision to include the Bank, Mr. Christian, Mr. Flinn and his law firm, as defendants in this action, and allege a conspiracy and seek damages. . . was the evidence of Justice Newsom's involvement with Gilbert Chilton, in a similar conspiracy. . . .

Watson Dec. at 9-10.

The latest "conspiracy" alluded to by Watson is allegedly among Justice Newsom, Gilbert Chilton, Tom Ginella and possibly others. Justice Newsom's alleged role was to "use his personal friendship and political influence with California governor Jerry Brown, and California Assembly Speaker Willie Brown, to have Chilton appointed . . . ." Watson Dec. App. at 14.

In support of these rantings, Watson appends newspaper articles and the transcript of Chilton's federal sentencing. This court has combed those submissions and finds nothing which even mentions Justice Newsom, let alone in any way props up this far-fetched theory. In fact, the very papers cited by Watson contradict him. At Chilton's sentencing, the idea of appointing Chilton came from a realtor and Chilton's employer at Guarantee Savings and Loan in Fresno. Watson Ex. 15 at 21.

Mr. Watson has not submitted any evidence at all tying Mr. Christian into these alleged conspiracies. In addition to the

"bribery" theory against Bank of America based on its loans to Justice Newsom, which the court disposed of above, Watson has pleaded an equally implausible theory of conspiracy based on the fact that both Justice Newsom and Bank of America were at one time trustees for the Getty Children's Trust. Watson initially posited that Justice Newsom and the Bank were co-trustees and that this was evidence of Justice Newsom's "strong ties" to the Bank.

When Watson was forced by this court to prove what investigation he had undertaken to substantiate these claims, he discovered that he had erred and that when Justice Newsom became a trustee, the Bank was no longer on the Board. Watson attempts to explain this error by stating that their "investigation disclosed no information that the Bank of America had resigned. . . ." Watson Dec. at 11. It appears to this court that the information could have been obtained easily by either contacting the Trust Fund or the Bank.

Undeterred by the facts, Watson presents an alternate theory in his latest declaration, namely that the Bank had resigned "for the express purpose of conferring a substantial financial benefit . . . upon Justice Newsom. " Id. at 11-12. Once again, Watson presents no facts and tries to support his allegations by terming them a "reasonable inference." Id.

The court is very disturbed at Mr. Watson's conduct. He has made baseless assertions against several well-respected state court judges and a former state court judge. While their reputations will remain unsullied by spurious attacks, they must nonetheless defend against them. The cost of personal and public purse and to the judicial process is great.

In attempting to justify groundless accusations, yet more groundless accusations have been spun. In the process yet more judges are swept into the "conspiratorial" net by implication. For example, in order to give Mr. Watson's stories about this case and the Sanchez-Corea case plausibility, the other judges joining those opinions would have had to be unduly influenced. In the Sanchez-Corea case none of the defendants here authored the opinion. Will Mr. Watson next allege that the judge who did author the opinion was also part of this ever-growing

"conspiracy?" Will he assert that another panel of judges, which recently rejected his client's effort to amend the complaint in the underlying state court proceeding is also a part of this "conspiracy?" See Bank of America National Trust and Savings Association v. Superior Court, 1990 Cal. App. LEXIS 510 (May 18, 1990). Will he next contend that the judges in this case and other judges who have rendered decisions in other lender liability cases favorable to the lenders are up to more mischief? See, e.g., Price v. Wells Fargo Bank,. 213 C.A.3d 465 (1989); Mitsui Manufacturers Bank v. Superior Court. 212 C.A.3d 726 (1989).

These questions are not idle given Mr. Watson's grandiose fantasies and conspiracy theories. They merely serve to point out the lengths to which he will go to bolster his far-fetched claims. Like a weaver of false tales once caught in a web of his own spinning, Mr. Watson has continued to elaborate upon those tales with further falsities and fanciful glosses.[4]

CONCLUSION

As noted above, the court finds plaintiff's motion for reconsideration to be wholly without merit and to be nothing more than a re-hash of the same misunderstandings and misrepresentations of the law. Additionally, the court has reviewed the voluminous submissions of attorney Watson and finds that, not only did Watson fail to make a reasonable inquiry into the facts underlying his allegations, he misinterpreted and ultimately misrepresented the facts contained in the information he did have at hand.[5] Particularly given the gravity of the accusations he has lodged, the court finds that Watson has in no way fulfilled the obligation of conducting a reasonable inquiry imposed by Rule 11 of the Federal Rules of Civil Procedure.

When ordinary avenues of review proved unfavorable, Mr. Watson set upon a course of making vituperative attacks upon the honesty and integrity of the judiciary. He made serious allegations of misconduct protected by the guise of a complaint and another lawsuit. This behavior not only violates Rule 11, it is irresponsible and contumacious. See note 3, supra. Mr. Watson was not satisfied to make groundless assertions in the original complaint, he has compounded these violations by adding further baseless assertions in his most recent submission. The casualness

with which these assertions are made, without any admissible evidence or in the face of contrary evidence, raises serious questions about counsel's behavior in the process. Watson does a grave disservice to the defendants and to the judicial system.

The court has wide discretion under Rule 11 to determine the amount of the sanctions award. See Hudson v. Moore Business Forms, Inc., 836 F.2d 1156, 1163 (9th Cir. 1987). The defendants have requested attorneys fees and costs associated with defending against plaintiff's allegations as well as between $100,000 and $200,000 in fines to act as a deterrent.

Given the amount of attorneys' fees at this point,[6] the court finds that an award of attorneys' fees and costs is an appropriate sanction.[7] While deterrence sanctions may be appropriate on this record, if the sanctions imposed above are not sufficient to deter Mr. Watson from again filing such scurrilous claims or making allegations without conducting the proper factual determinations, then it is unlikely that additional monetary sanctions will provide any greater deterrent.

Indeed, Mr. Watson's conduct sinks far below the level of conduct contemplated by Rule 11. He may have taken himself beyond deterrence into the perilous realm of conduct proscribed by the Rules of Professional Conduct. Observing Mr. Watson's manner of litigating in this action, the court has grave concerns regarding his representation of this and other clients. If Mr. Watson believes that this is a proper means of redressing the claims of his clients or obtaining review of unfavorable decisions, he seriously misperceives his obligations as an attorney and officer of the court.

Based upon this court's review of the entire record Mr. Watson has concocted in this case, it appears that he has violated Rules 3-200 and 5-200(A), (B), (C) and (E) of the California Rules of Professional Conduct and Rule 110-3 of the Local Rules of this court. Referral for inquiry by the prescribed regulatory bodies is a more effective and appropriate response than further monetary sanctions.

Accordingly, plaintiff's motion for reconsideration is DENIED. Defendants' motion for sanctions is GRANTED, the

amount to be paid by Frederick Watson. Defendants are to submit within fifteen (15) days from the date of this order declarations as to the amount of attorney's fees and costs expended in opposing plaintiff's complaint and responding to attorney Watson's declaration. Attorney Watson will then have fifteen (15) days to respond only as to the reasonableness of the fees.

IT IS SO ORDERED.

Dated: June 18, 1990

MARILYN HALL PATEL
United States District Judge

ENDNOTES

1. For example, in the first amended complaint, Watson asserted that Bank of America "bribed" Justice Newsom by lending him $50,000 in December 1980 to avoid foreclosure on a condominium loan. The loan was in fact not a personal loan, but a loan to both Justice Newsom and Tom Englund and was a restaurant, not a condominium. Furthermore, the default in the amount of only about $2,0000 [sic], and thirdly, Justice Newsom had sold his interest in the property two years before the default was filed. Not only were these facts available to Watson prior to filing, some of the true facts were contained in documents appended to the pleadings. See App. Ex. 8:3_____ (notice of default and deed of trust on Justice Newsom's _____ Flat home).

Furthermore, in May of 1982, one month after Justice Newsom allegedly entered into the "conspiracy" with the Bank he paid off the $50,000 loan. Req. for Judicial Notice, ____ E.

2. Although Watson asserts that Justice Newsom "embezzled" money from his family trust account, Watson never seems to have contacted Justice Newsom's siblings to corroborate these allegations. All of Justice Newsom's siblings have provided declarations which counter these allegations. See declarations of Sharon Newsom Mohun; Brennan Newsom; Carole Onorato; Patrick Newsom; and Barbara Newsom.

3. Defendants have presented evidence that plaintiff's attorney has a history of attempting to have justices from whom he has determined he might not be able to win on the merits recused.

At least two of these, besides this court, have questioned Watson's integrity. In 1980, Watson, representing plaintiffs in Deal Development Co., Judicial Council Coordination Proceeding No. 318 (San Francisco Superior Court) moved to disqualify then Judge (now Justice) John E. Benson. At oral argument on the disqualification motion, Judge Benson stated for the record that he questioned Mr. Watson's integrity and that for that reason he chose to recuse himself.

Similarly, in 1981 in proceedings on the same case, Watson sought disqualification of Judge Eugene F. Lynch (now on the Federal bench, then sitting on the Superior Court), questioning the Judge's ability to be unbiased in light of his pending nomination to the federal bench. Judge Lynch also recused himself, stating that the fact that Watson sought to disqualify him gave him "problems." Moses Dec., Exs. B, C.

Additionally, on November 17, Watson filed with this court a request that the court sua sponte disqualify itself, questioning this court's ability to be impartial, by citing to this court's ruling favorable to Justice Newsom and some wholly unrelated criminal case involving narcotics trafficking. Memo re Constitutional Objections at 21.

4. Shakespeare said it best and most succinctly: "Slander lives upon succession, Forever housed where it gets possession." The Comedy of Errors.

5. Furthermore, Mr. Watson has repeatedly, both in his original submission and then in his motion for consideration, misinterpreted and ignored the principles of res judicata and the Rooker-Feldman doctrine and misrepresented the applicable case law. Although the legal conclusions Watson draws would serve as an independent basis for sanctions, the alleged "factual" assertions contained in the pleadings are so egregious as to easily support defendants' motions for sanctions and therefore the court will not address the alternative basis.

6. Justice Newsom's attorneys have submitted a figure of approximately $177,000 to date in attorney's fees and costs. It is unclear to the court whether this figure is a total for all attorneys or whether it simply represents the amount for representation of Justice Newsom.

7. It is possible that the legal representation of the justices will ultimately be borne by the taxpayers. Cal. Gov. Code §§ 995, 996. No matter; the court is equally concerned whether the cost is being borne by individuals or comes out of the public fisc.

APPENDIX E

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IRENE O'CONNELL KRUSE	)	
	)	
Plaintiff,	)	No. C-89-1440 MHP
	)	
-vs.-	)	MEMORANDUM
	)	AND ORDER
COURT OF APPEAL OF THE STATE	)	
OF CALIFORNIA FOR THE FIRST	)	[Filed August 22,
APPELLATE DISTRICT, et al.,	)	1990]
	)	
Defendants.	)	
	)	

Plaintiff Irene O'Connell Kruse originally filed this action under the Civil Rights Act of 1871, 42 U.S.C. § 1983, alleging that defendants, acting under color of state law, had violated her constitutional rights. In an order dated August 21, 1989 this court found that it was without jurisdiction to grant plaintiff the requested relief. On June 18, 1990 the court denied plaintiff's motion for reconsideration and granted defendants' motion for sanctions.

At that time, defendants were requested to submit declarations as to the amount of attorneys' fees and costs, and plaintiff's counsel was given time to respond only as to the reasonableness of the fees and costs requested. The court noted that these were the only submissions it sought.

In spite of the court's clear orders, counsel for defendant Justice Newsom filed a reply, to which reply plaintiff filed a response. Additionally, the attorney general's office, which represents defendant California State Court of Appeal submitted copies of two orders relating to other actions of Mr. Watson in front of the California Court of Appeal, to which submission Mr. Watson reacted by filing a twelve-page response. The court did not entreat and will not allow the uninvited submissions mentioned

above. Accordingly, all submissions beyond defendants' counsels' declarations and Mr. Watson's initial reply are stricken.

Second, Mr. Watson asserts that he is being denied due process because, notwithstanding the extraordinarily voluminous submissions he made on this matter, the court did not hold a hearing. As support for this position Mr. Watson cites to Tom Growney Equip. v. Shelly Irrigation, 834 F.2d 833, 835-37 (9th Cir. 1987). However, Mr. Watson not surprisingly neglects to mention that in the later case of Hudson v. Moore Business Forms, 898 F.2d 684, 686 (9th Cir. 1990), the Ninth Circuit, also citing Tom Growney, stated that the only necessary due process protections in a sanctions action are "notice and an opportunity to respond." In Hudson, the Ninth Circuit affirmed this court's imposition of sanctions without an opportunity to respond orally, where the party to be sanctioned was notified of the action and was give full opportunity to respond in writing. As Mr. Watson's declaration alone totalled in excess of 400 pages, he can hardly be heard to complaint that he did not have a sufficient opportunity to respond in writing.

As to the reasonableness of the fees and costs requests, the request of the attorney general's office for $15,141.45 in fees and for $40 in costs is not unreasonable and is therefore granted. See Matter of Yagman 7906 F.2d 1165 (9th Cir. 1986). Similarly, the application of Anthony Tepel, attorney for Justice Racanelli, for $23,392.50 in fees and $1,864.28 in costs is found to be reasonable and granted. These amounts are well within the range, if not low, for responding to plaintiff's voluminous submissions.

The application by Justice Newsom's counsel, the law firm of Orrick Herrington & Sutcliffe ("Orrick"), for fees and costs in excess of $224,000 is somewhat problematic. The court recognizes that the allegations against Justice Newsom were wide-ranging and did not lend themselves to being easily deciphered. The court also recognizes that the rambling nature of Mr. Watson's copious filings throughout the proceedings would dramatically increase the workload of any conscientious attorney seeking an adequate response to claims the nature of which were difficult to fathom. However, it appears to the court that having employed a cadre of partners (five), associates (four), summer law clerks (four), legal assistants (eight), as well as using the services

of the library staff and an investigator, amounted to overkill. The court can understand the need to meet the inordinate number of serious and scandalous charges with forceful advocacy. Such heavy staffing, however, suggests duplication of effort and failure to effectively delegate work.

Accordingly, the court will deduct 20% from the billings of partners Richard Lucas ($92,820.00) and Barbara Moses ($71,826.25) for a total of $131,717.00. None of the fees for any of the other partners consulted on this matter will be compensated. As for associate time, only the work of Ms. Smiley, who stood in for Ms. Moses while she was out of the office during November and December of 1989 is to be compensated. This work of Mrs. Smiley totals $6,300.00 in fees.

Additionally, because as the court expressed above, it concludes that work was duplicated, it will only provide fees for the work of one legal assistant and one summer clerk. Mr. Correll's labors, at a cost of $2,305.62 are to be compensated, as is the work of summer law clerk Tom Klein who researched jurisdiction issues, drafted an application for leave to file an oversized brief and researched the standards under Rule 11, issues clearly relevant to the case. Mr. Klein's work was billed at $3,750.00. The court will grant reimbursement for costs in full in the amount of $15,365.87, as well as the fee of the private investigator at $6,598.98. The total of $144,072.62 in fees and $21,964.85 in costs is therefore to be paid to the Orrick firm.

CONCLUSION

Accordingly, all submissions beyond defendants' counsels' declarations and Mr. Watson's initial reply are stricken. Plaintiff's counsel Frederick Watson is to pay the attorneys' fees and costs enumerated above within ninety (90) days from the date of this order.[1]

IT IS SO ORDERED.

Dated: August 22, 1990

MARILYN HALL PATEL
United States District Judge

ENDNOTES

1. Mr. Watson recently claimed that imposing sanctions on him will reduce him to filing for personal bankruptcy. However, the court notes that in his earlier declarations, as evidence of his prowess as an attorney in these types of actions, Mr. Watson was only too eager to tout his string of successes in obtaining numerous multimillion dollar judgments for other clients. See Declaration of Frederick Watson re Possible Imposition of Rule 11 Sanctions at p. 5 (recoveries in excess of $20 million for similarly situated clients). Absent evidence of profligacy or some indication that Mr. Watson's services in these actions were provided pro bono publico, the court assumes that Mr. Watson indeed has the ability to satisfy this judgment.

APPENDIX F

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

[Filed September 1, 1988]

First District, Division One, No. AO33064, AO39161

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KRUSE, Appellant,

v.

BANK OF AMERICA, Appellant;
DUCK ETC., ET AL., Appellants

LUCAS, C.J. AND PANELLI, J., DID NOT PARTICIPATE.

The requests to take further evidence are DENIED because petitioners have not made a prima facie showing of conflict of interest or bias, much less a deprivation of due process of law.

The petitions for review are DENIED.

MOSK, Acting Chief Justice

APPENDIX G

September 19, 1988

Frederick G. Watson
111 Civic Drive, Suite 300
Walnut Creek, CA 94596

Re: S006208 - Kruse v. Bank of America

Dear Mr. Watson:

Your petition for a rehearing received this date after denial on September 1, 1988 of a petition for review is being returned because a summary denial of a petition for review is not a decision that determines a cause. This court continues to adhere to its policy that decisions summarily denying a petition for review are not subject to reconsideration.

Rule 27(a) of the California Rules of Court provides that this court may grant a rehearing "after its own decision in any cause." A case does not become a "cause" in the Supreme Court until review is granted pursuant to rule 28. And, while a summary denial of a petition for review is, in the generic sense of the word, a decision, it is not a decision of the Supreme Court as cited in article VI, section 14 of the Constitution, which specifies that "Decisions of the Supreme Court . . . that determine causes shall be in writing with reasons stated." (Italics added.) A summary denial of a petition for review, a decision which does not determine a cause, requires neither a written opinion nor a statement of "reasons."

I hope that this letter clarifies the issue.

Very truly yours,

JOHN C. ROSSI
Acting Clerk of the Supreme Court

JCR:mej

APPENDIX H

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

HONORABLE MARILYN HALL PATEL, JUDGE PRESIDING

IRENE O'CONNELL KRUSE	)	
	)	
Plaintiff,	)	No. C-89-1440 MHP
	)	
-vs.-	)	
	)	
COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, et al.,	)	
	)	
Defendants.	)	
	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
MONDAY, AUGUST 14, 1989
SAN FRANCISCO, CALIFORNIA

CORRECTED FINAL VERSION

REPORTED BY: DONALD F. BEAUDOIN
COURT REPORTER

APPEARANCES

FOR PLAINTIFF:

Frederick Watson
111 Civic Drive
Suite 300
Walnut Cree, CA 94596

FOR DEFENDANTS:

Richard Van Duzer
Jerome Braun
Linda Ross
Russ Building
235 Montgomery Street
Suite 3000
San Francisco, CA
(WILSLOW CHRISTIAN, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION)

Richard Frank
Deputy Attorney General
P. O. Box 944255
1515 K Street
Sacramento, CA 94244-2550
(COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT

Richard J. Lucas
Barbara Moses
Old Federal Reserve Bank Building
400 Sansome Street
San Francisco, CA 94111
(JUSTICE WILLIAM A. NEWSOM)

Anthony J. Trepel
60 S. Market Street
11th Floor
San Jose, CA 95113
(JOHN T. RACANELLI)

Susanne M. de Kozan
Deputy County Counsel
County of Sonoma
575 Administration Drive, Room 116A
Santa Rosa, CA 95403-2281

Monday, August 14, 1989 10:30 A.M.

THE CLERK: Civil Number 89-1440. Kruse v. Court of Appeals of the State of California, et al. Motion to Dismiss.

Counsels' appearances have been noted.

THE COURT: Thank you. Who is going to be heard on behalf of the Court of Appeals? You don't have to come up to the podium. Just state your names so the record will show who is talking.

MR. FRANK: Richard Frank, Supervising Deputy Attorney General on behalf of the Court of Appeals.

THE COURT: Okay. Is that Frank?

MR. FRANK: Yes, Your Honor.

THE COURT: And I think we have a single appearance on behalf of Justice Newsom.

MR. LUCAS: Richard Lucas, Your Honor.

THE COURT: Thank you.

MR. TREPEL: Anthony Trepel, Your Honor.

THE COURT: Thank you. And Farella, Braun and Martel for the rest of the defendants?

MR. BRAUN: Yes, Your Honor. We represent Winslow Christian and Bank of America National Trust and Savings Association.

THE COURT: Thank you. Mr. Flinn is a partner in Leland, Parachini?

MR. FLINN: Correct, Your Honor.

THE COURT: Thank you. Well, this matter is on the Law and Motion Calendar. I will give you a tentative ruling, and

ask you to be heard on it or give you some time to argue or ask some questions.

I am at sort of a loss as to what to do here, Mr. Watson, because in my review of the papers, the action is so wholly without merit, for a number of reasons, that I don't want to mislead anybody in argument or asking questions.

The only question I have to ask is, what kind of investigation was done as to some of the facts as made in the complaint before this complaint was filed. So I will tell you what my tentative and what my final ruling would be in this case with regard to the action itself, and that is that first of all, some of the causes of action are patently nothing more than an attempt to seek this Court's review of decisions or a decision of the State Court.

I think any first year law student knows from reading the basic text whether Miller or Wright or whatever in Federal Courts as to what the Federal Courts can and cannot do. We are not, I believe, at that state of the proceedings where the Courts can be asked to enjoin, and which get into questions of anti-injunction. We are talking about the decisions that are final on their merits. And with the exception of conspiracy allegations, there is absolutely nothing in this complaint more than an attempt to get this Court to review decisions that were made by the State Court.

With respect to the conspiracy allegations, those allegations are very easy to make. Unfortunately, I think in this case, perhaps too easily made without regard to the consequences of such allegations when they were made. The case of Beard v. Udall is probably of all the cases the one most favorable to you. It is very easy to make those kinds of allegations into the process, but I have serious questions about the allegations were made with any reasonable investigation of the facts.

Furthermore, the underpinning of that claim is that each and every other claim in this case has been decided by California Courts. And the California Supreme Court couldn't have made it clearer when it ruled. And I will read some of it -- and it is also very clear when it ruled that the request to take further evidence because the plaintiff did not make a prima facie showing. That means plaintiff you lose. And you cannot say it any clearer than

that as to each of the issues raised here. That's a final decision. It was reviewed by the Supreme Court and denied. You do not get a second go around in this Court. Most attorneys know that when you lose you lose. You don't try to collaterally end run a decision of the State Court.

MR. WATSON: No, Your Honor --

THE COURT: I don't see how you can justify this kind of an action.

MR. WATSON: May I point out, Your Honor -- you don't see --

THE COURT: I don't see what?

MR. WATSON: Well, a considerable amount of effort, Your Honor, went into defense of it. First of all, the suit was filed only after a year of investigation, of the facts and the law. Second, there was no discussion by the California Supreme Court on the merits. There was not --

THE COURT: Did you hear what I just read to you?

MR. WATSON: I understand, Your Honor.

THE COURT: What do you think it means when you don't have a prima facie case? You don't have a prima facie case. That is a decision on the merits. You took it up on appeal, and that was reviewed.

MR. WATSON: I agree, Your Honor. If this had been tried in a trial court --

THE COURT: What authority do you have for that proposition? You haven't cited any authority for that proposition. Doesn't California have the power to decide a case on the merits and give us some finality?

MR. WATSON: That's questionable. There was no cause of action filed in the California Supreme Court and --

THE COURT: That doesn't matter. You raised each one of those issues before the Court of Appeals. You raised them before the Supreme Court. The Supreme Court rendered that decision. They have decided it on the merits.

MR. WATSON: Excuse me, Your Honor. That is not correct. The constitutional issues were not raised in the Court of Appeals. The only thing raised in the Court of Appeals was a question of disqualification of the Justices under statutory law pertaining to disqualification. The decision of the United States Supreme Court in Aetna v. Lavoie is very very clear that state law disqualification statutes are night and day different from a question of federal due process. But I'm sure Your Honor knows that there are many many -- even majority instances where a judge may feel some financial necessity or friendship for a person coming before a judge. And that --

THE COURT: We are not talking about a disqualification. We are talking about what issues were raised before the Court of Appeals.

MR. WATSON: Your Honor, may I --

THE COURT: The issues were raised before the Court of Appeals, according to your very petition raises the issue and opinions were wrongfully decided because of these very biases and prejudices and that your client was denied due process.

MR. WATSON: Your Honor, as to the California --

THE COURT: And also a rehearing before the Court of Appeals --

MR. WATSON: Your Honor, there was no mention of a denial of due process with respect to the bias or prejudice or disqualification, Your Honor. We had no bias at that time for alleging any kind of conspiracy regardless of the merits. We spent, as I said, a year looking at court records and public records. It's all we could get. We were denied any information by the Justices. We asked them to please disclose all facts bearing upon their own previously announced disqualification --

THE COURT: The California Supreme Court was aware of your allegations. They denied your discovery. They decided against you, Mr. Watson.

MR. WATSON: Excuse me, Your Honor. You are speaking of discovery in a trial court or before the California Supreme Court --

THE COURT: You had discovery, did you not? We could not seek discovery in the sense Your Honor is speaking of. We knew that the only way we could establish a violation of the Federal Constitutional rights was to have a factual inquiry as to whether or not there was bias and prejudice, and to be fair and impartial as to whether there was in fact disputes in the probate court. We had found records of --

THE COURT: What does that have to do with anything?

MR. WATSON: It has to do with --

THE COURT: Mr. Watson, this is wholly without merit, scurrilous and irrelevant to the proceedings. And this business about the -- you know, Justice Newsom's grandfather, it reads like a tabloid. It doesn't read like a legal complaint and this is not the place to present a tabloid, Counsel.

MR. WATSON: Your Honor, I want --

THE COURT: Counsel, I'm going to grant the motion to dismiss. There is no basis in law. And all the issues that are raised here have been adjudicated by the California court. You have had plenty of opportunity to address those in the papers. And I'm not going to allow this to consume one more day of the Court's time.

I am going to ask you to submit, within thirty days of today's date, a declaration setting forth every effort that you have made to verify the facts that you have alleged in this complaint because some of them are pretty outrageous. They have in fact been refuted by various declarations and so forth. I'm not going

to turn this into a motion for summary judgment because it's clearly been dismissed on its merits.

I am, however, going to look at the declaration and determine whether or not any sanction should be imposed because I don't think any attorney who practices before this court and in the state of California should be allowed to make these kinds of allegations set out in the complaint without having done some pretty strong and thorough kinds of investigations.

MR. WATSON: Did Your Honor read the appendix?

THE COURT: I read them. I read all the papers, Counsel.

MR. WATSON: But did you read the appendix --

THE COURT: I read the appendix and I've read all of the papers. And that is irrelevant to the proceedings.

MR. WATSON: Your Honor, the papers --

THE COURT: One of the things you claim is a $50,000 loan from the bank, a line of credit given to him by the bank, and financial statements that were filed with the State of California.

MR. WATSON: Those do not state the --

THE COURT: That this man was not creditworthy, but according to the facts, that debt was paid off. It was not only secured, which is something you failed to say, in fact, you deny it was secured. It was paid off before and had nothing to do with this case.

MR. WATSON: That's correct, Your Honor, but it was really in the Sanchez-Corea case, Your Honor. There was a loan made just shortly or a year or so before, and there was an interlude of seven years where the Bank of America made no other major loan until in August of 1985 one month after the decision, judgment of $47 million dollars came in. The Sonoma

Superior Court. And seven years where the Bank of America made another loan, gave a line of credit immediately after that --

THE COURT: Mr. Watson, do you have credit cards? Do you have any credit cards in your pocket?

MR. WATSON: Yes, I do, Your Honor.

THE COURT: And do you have a line of credit on each one of them, each of the credit cards, I imagine?

MR. WATSON: Well, Your Honor, there is --

THE COURT: I have credit cards with I. Magnin and others. My husband and I have credit cards. And they all carry about the same line of credit. He makes more than I do, so he pays the bills, but each card carries about the same line of credit that you are saying that Justice Newsom has here.

MR. WATSON: That's not correct, Your Honor. The preferred custom line of credit that is alleged in the complaint -- and Your Honor, do you accept for purposes of this motion the truth of the facts pleaded?

THE COURT: I am dealing with the motion to dismiss. That is the only thing I'm interested in is a determination of the facts is whether or not sanctions are appropriate. Mr. Watson, that is all I am interested in.

MR. WATSON: Your Honor, may I argue -- Does Your Honor accept for purposes of this motion the truth of the facts pleaded in ruling on the motion?

THE COURT: Are you suggesting that I don't know what the rules under Rule 12 are?

MR. WATSON: No.

THE COURT: Well, then you better assume that.

MR. WATSON: All right. May I finish the point, Your Honor? In our investigation we included calling the 800 number

of Bank of America to ask what was the nature of their preferred customer line of credit. We were given the annual financial disclosure statement, and that it is given to preferred credit customers, given only to those on a basis where they get up to $50,000 line of credit, unsecured. As I say, this was given --

THE COURT: So, what is wrong with that? They do business with the bank on a routine basis. They pay their bills on time. Most people can get that line of credit. There's nothing out of the ordinary with Justice Newsom having that line of credit.

MR. WATSON: Your Honor, as the pleadings shown in the appendix show a number of foreclosures and failure to pay back a $2,000 student loan that was 14 years old. Certainly I submit, Your Honor --

THE COURT: Was it owed to the Bank of America?

MR. WATSON: Pardon me?

THE COURT: Was it owed to the Bank of America?

MR. WATSON: No, Your Honor. But Your Honor asked what evidence do I have that he didn't have good credit.

THE COURT: What does that have to do with anything? You are taking the man's history back to grade school and back to his grandfather?

MR. WATSON: Excuse me, Your Honor. You asked a question of what evidence did we have that he did not have good credit. And I am attempting to explain that to you, Your Honor. And it would appear that Your Honor doesn't want to hear that.

THE COURT: He had a $50,000 loan and he paid it back, paid it back two years later.

MR. WATSON: I know, but Your Honor, it's not the fact of whether he paid it back. It is the fact as to why the Bank of America gave it to him when he had a bad credit record.

THE COURT: Where did you get the facts to base it that he had a bad credit record?

MR. WATSON: I am attempting to tell you, Your Honor. All of these judgments and foreclosures that were taken.

THE COURT: Some amounted to $39. or $15. and did you bother to check on that?

MR. WATSON: How could I, Your Honor? I could just get it by public records. They would not tell me the amounts. They came two years after we asked him to explain why he and Justice Racanelli announced in open court that they were disqualified to sit on the Sanchez-Corea appeal.

THE COURT: That still doesn't add up, counsel. These matters are in fact not true, and now you are trying to get a review of a decision that was final in the state court.

MR. WATSON: Your Honor, when you say these matters are not true, are you accepting Justice Newsom's declaration for purpose of the motion to dismiss?

THE COURT: I am telling you, counsel, that I am taking judicial notice --

MR. WATSON: Of his declaration?

THE COURT: Let me finish. I have read all of the record of the state court and those records including the denial of review by the California Supreme Court. It makes it very clear that all of these issues have been addressed in the state court and res judicata or collateral attack as to all of the claims in this court.

The only thing in terms of his declaration is what investigation plaintiff did in filing this action which is unusual to say the least. I think it's bad enough that a pro per could file an action like this, but an attorney who is a member of the Sate Bar to file an action and make the kind of allegations that she made here against the Justices of the State Court and other attorneys, had better be well grounded in fact before you do that.

MR. WATSON: Your Honor, I --

THE COURT: It raises serious questions about competency, so I want within 30 days a declaration from you as to each and every bit of investigation you did in order to satisfy yourself of the facts alleged in the complaint are true particularly the part of the complaint that I am concerned with, so you had better get a pencil. I want all of this business about his grandfather and being appointed by Jerry Brown and being a cotrustee. And the facts in the complaint and appendix as to the creditworthiness made by your allegations. I want to know, what, if any, investigation was done as to the facts contained in paragraph 24/4 through paragraph 30, which by the way, contains an allegation that -- and I would hope that an attorney will be very very careful about making -- in that he engaged in breach of fiduciary duty amounting to criminal embezzlement. Paragraph 38. Paragraph 38 thorough 50. Specifically, I want to see what investigation was done to determine the accuracy of the facts and why it was that you did not in fact discover the facts that are now set forth in the declaration submitted in support of Justice Newsom's motion to dismiss. That's the most important. Those are factual allegations that I think have gotten out of hand and are not justified. but I will issue an order dismissing the action. If any attorney -- If any attorney wants to be heard --

MR. LUCAS: Thank you, Your Honor.

THE COURT: Hold on a minute, Mr. Lucas. You are representing Justice Newsom?

MR. LUCAS: Yes, Your Honor.

THE COURT: 30 days. I will give you two weeks to respond thereafter, if you wish.

MR. LUCAS: Fine, Your Honor.

THE COURT: As to the adequacy of the investigation. And then I will set down a hearing date after I get those for a hearing on a motion for sanctions, whether sanctions shouldn't be imposed.

I think the Court should discourage any litigant from attempting to come back in this Court and try to seek review of what is a final state court decision.

MR. LUCAS: Thank you, Your Honor.

THE COURT: Yes?

MR. BRAUN: Will there be an order before completion of the 45 days?

THE COURT: Yes, there will be an order with respect to the motions to dismiss.

MR. FRANK: One other question, the Court of Appeals has a motion for sanctions. Do I understand the Court is sitting [sic] a date for that motion as well?

THE COURT: At the same time.

MR. FRANK: At the same time.

THE COURT: Anything else for the record?

MR. FRANK: Nothing further, Your Honor.

MR. WATSON: I will state for the record that the motions that I submitted with respect to the law is very clear, that there must be a decision on the merits. And the California Supreme Court did not render a decision on the merits when it made a denial of appellate review. Counsel for defendants had introduced what I submit is a spurious argument whereby the statutes are the sole method of judicial review and I just want --

THE COURT: The California Supreme Court rendered its determination, but that only goes to a conspiracy issue, counsel. Mr. Watson, most of the claims you have in this complaint are nothing more than an attempt to have this court review a decision. You are arguing about switching theories. Your other arguments are really direct attacks collaterally made upon the state court's decision. The only one that even gets you by that is the conspiracy claim by having made those allegations

of the conspiracy. But all the underlying facts, allegations, are the same. And they were heard, and they were rejected by the California Supreme Court. You were dead bang wrong. You don't get a new trial on that. You raised them at the appellate level. You raised them before the Supreme Court. That's final.

MR. WATSON: Your Honor, I just want to --

THE COURT: The matter is deemed submitted.

MR. WATSON: All right. Your Honor, referring to Robinson v. Ariyoshi decision in Hawaii and the 9th Circuit --

THE COURT: In that case, there was no such specific decision out of the Hawaii Court. The cases are dismissed; that's the end of it. And I am not wasting any more time on it. All right.

- - -

I certify that the foregoing is a correct transcript from the record of proceedings in the above entitled matter.

Dated: August 26, 1989

DONALD F. BEAUDOIN
Court Reporter

APPENDIX I

No.

In the Supreme Court

OF THE

UNITED STATES

October Term, 1988

IRENE O'CONNELL KRUSE,
Petitioner,

vs.

BANK OF AMERICA, N.T. & S.A.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT, DIVISION ONE

WILLIAM M. LUKENS*
LUKENS, COOPER, PERRY & DRUMMOND
One Maritime Plaza, Suite 1600
San Francisco, CA 94111
Telephone: (415) 433-2261

FREDERICK E. WATSON*
A Professional Corporation
1111 Civic Center Drive, Suite 300
Walnut Creek, CA 94596
Telephone: (415) 947-0393
Attorneys for Petitioner

*Counsel of Record

APPENDIX J

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IRENE O'CONNELL KRUSE, Plaintiff-Appellant, v. COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, WILLIAM A. NEWSOM; JOHN T. RACANELLI, in their individual and official capacities as members of Division One of the said Court of Appeal; SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SONOMA; WINSLOW CHRISTIAN; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; LELAND PARACHINI, STEINBERG FLINN, MATZGER & MELNICK; DAVID B. FLINN, Defendants-Appellees.	No. 90-16133 D.C. No. CV-89-1440-MHP ORDER [Filed March 5, 1992]

IRENE O'CONNELL KRUSE,	)	No. 90-16444
	)	
Plaintiff,	)	D.C. No. CV-89-1440-MHP
	)	
and	)	
	)	
FREDERICK WATSON	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, WILLIAM A. NEWSOM; JOHN T. RACANELLI, in their individual and official capacities as members of Division One of the said Court of Appeal; SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SONOMA; WINSLOW CHRISTIAN; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; LELAND PARACHINI, STEINBERG FLINN, MATZGER & MELNICK; DAVID B. FLINN,	)	
	)	
Defendants-Appellees.	)	
	)	
IRENE O'CONNELL KRUSE,	)	No. 90-15201
	)	
Plaintiff-Appellant,	)	D.C. No. CV-89-1440-MHP
	)	
v.	)	

COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, WILLIAM A. NEWSOM; JOHN T. RACANELLI, in their individual and official capacities as members of Division One of the said Court of Appeal; SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SONOMA; WINSLOW CHRISTIAN; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; LELAND PARACHINI, STEINBERG FLINN, MATZGER & MELNICK; DAVID B. FLINN,

Defendants-Appellees.

Before: GOODWIN, SCHROEDER, and NOONAN, Circuit Judges

Appellants' motion to supplement their objection to appellees' motion for attorneys' fees on appeal and to supplement their request for investigation of fraud on the court is GRANTED.

Appellee California Court of Appeal's motion for attorneys' fees on appeal is GRANTED. 28 U.S.C. § 1912, Fed. R. App. P. 38. Appellant Watson is hereby directed to pay the Court of Appeal the sum of $7,218.75.

Appellee Justice Newsom's motion for attorneys' fees on appeal is GRANTED. 28 U.S.C. § 1912; Fed. R. App. P. 38. Appellee Justice Newsom is hereby directed to submit an itemized statement setting forth the amount of attorneys' fees incurred on appeal, together with appropriate supporting declarations.

(2)

No. 91-1536

Supreme Court, U.S.
FILED
APR 9 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1991

IRENE O'CONNELL KRUSE AND FREDERICK E. WATSON,
Petitioners,
vs.
COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT; WILLIAM A. NEWSOM, JOHN T. RACANELLI, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES AS MEMBERS OF DIVISION ONE OF THE SAID COURT OF APPEAL; SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SONOMA; WINSLOW CHRISTIAN; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; LELAND PARACHINI, STEINBERG, FLINN, MATZGER & MELNICK; DAVID B. FLINN,
Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JEROME I. BRAUN*
LINDA M. ROSS
FARELLA, BRAUN & MARTEL
235 Montgomery Street
San Francisco, CA 94104
Telephone:(415) 954-4400

Attorneys for Respondents Winslow Christian; Bank Of America National Trust & Savings Association; Leland Parachini, Steinberg, Flinn, Matzger & Melnick; And David B. Flinn

MICHAEL J. HALLORAN
KRISTIAN D. WHITTEN
BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION
555 California Street
San Francisco, CA 94104
Telephone:(415) 622-6656

Attorneys for Respondent Bank Of America National Trust & Savings Association

*Counsel of Record

QUESTIONS PRESENTED

1. Should this Court review a Federal District Court decision that the *Rooker-Feldman* doctrine precluded a federal court from deciding issues already raised and decided by the California Supreme Court and already raised by a Petition for Writ of Certiorari in this Court when the District Court decision was based squarely on *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and did not involve novel or unsettled federal legal issues?

2. Should this Court depart from the usual rule that it does not review state law issues where the state law issue of *res judicata* is well-settled and arises from a unique procedural posture that affects only the parties to this action?

3. Should this Court reconsider *Pulliam v. Allen*, 466 U.S. 522 (1984) at Petitioners' request when they have conceded that the judicial Respondents should be dismissed and *Pulliam* has no bearing on the *Rooker-Feldman* or *res judicata* defenses that bar this action against the remaining Respondents?

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This opposition is filed on behalf of Respondents Winslow Christian; Bank Of America National Trust & Savings Association (the "Bank"); Leland Parachini, Steinberg, Flinn, Matzger & Melnick; and David B. Flinn (the "Bank Respondents")[1/] who respectfully request that this Court deny the Petition For Writ Of Certiorari filed by Petitioners Irene O'Connell Kruse ("Kruse") and her attorney Frederick E. Watson ("Watson").

INTRODUCTION

This is the second time Kruse has filed a Petition for a Writ of Certiorari in connection with the basic facts of this case.

1/ Bank of America, N.T. & S.A. owns less than a 100% interest in the following subsidiaries: Banco Colombo Americano, Bank of America S.A.E., The Electronic Payments Exchange, Inc., and Bank of America International Limited. Bank of America N.T. & S.A. is itself wholly owned by BankAmerica Corporation, all of the subsidiaries of which are wholly owned.

In the first Petition, Kruse, represented by Watson, claimed that three Justices of the California Court of Appeal (two of whom are respondents here) violated her Fourteenth Amendment rights by their decision to reverse her $3.77 million dollar state court judgment against the Bank of America. *See Kruse v. Bank of America*, 202 Cal.App.3d 38, 248 Cal.Rptr. 217 (1988). That Petition was denied on January 23, 1989. *Kruse v. Bank of America*, 488 U.S. 1043 (1989) (No. 88-934).

Upon the denial of that Petition, Kruse, again represented by Watson, switched forums. She brought a Section 1983 action in federal District Court, claiming that the defendant Justices, the Bank and its inside and outside counsel had conspired to violate her federal constitutional rights by reversing her state court judgment. Those claims were dismissed by the District Court based on

res judicata and the *Rooker-Feldman* doctrine. Sanctions were imposed against attorney Watson under Federal Rule of Civil Procedure 11 for filing a factually frivolous complaint. The Ninth Circuit Court of Appeals affirmed.

This second Petition for a Writ of Certiorari again brings before this Court Kruse's claims that her federal constitutional rights were violated by the Court of Appeal Justices. Like her first Petition, this one also should be denied, for the following reasons:

(1) The application of the *Rooker-Feldman* doctrine by the District Court did not, contrary to Kruse's assertion, raise an important issue of federal law. The decision fell squarely within long-established doctrine, created by this Court, that a federal legal issue actually decided by a state court cannot be reviewed by a federal district court. *See Rooker v.*

Fidelity Trust Co., 263 U.S. 413, 415 (1923). There is no need for this Court to address whether the issues decided by the state courts were "inextricably intertwined" with those presented in the federal case, because Kruse raised the *same* federal constitutional issues in both state and federal court.

(2) The lower court's application of *res judicata* to bar relitigation of Kruse's claims does not raise an issue of federal law, much less an important issue. Based on 28 U.S.C. § 1738 and *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984), the federal District Court applied California state law to determine whether the decision of the California courts should be given preclusive effect. There are no extraordinary circumstances in this case that warrant departure from the usual rule

that this Court does not review state law issues.

(3) Finally, Petitioners' curious concession that *Pulliam v. Allen*, 466 U.S. 522 (1984) should be reconsidered and held to preclude claims for injunctive relief against the judicial Respondents has no effect on these Bank Respondents. Nothing in the record supports Petitioners' argument that the District Court's disagreement with *Pulliam* motivated its decision. Moreover, even if it did, dismissal of the judicial Respondents does not change the application of *res judicata* or *Rooker-Feldman* to bar the claims brought against these non-judicial Bank Respondents.

This opposition does not address the question presented concerning the attorneys' fees imposed against Watson under Rule 11 because none were requested by these Respondents.

STATEMENT OF THE CASE

A. The State Court Action: *Kruse v. Bank of America*

This litigation originated in 1980 when Kruse, represented by Watson and other counsel, filed *Kruse v. Bank of America National Trust and Savings Association* in Sonoma County Superior Court in California. In that state court action, Kruse claimed that the Bank fraudulently induced her to transfer, to her detriment, a controlling interest in her family apple-growing and processing business.

In July of 1985, a Sonoma County jury awarded Kruse $2.77 million in compensatory damages and $6.675 million in punitive damages. Judgment was entered on the verdict following Kruse's acceptance of a remittitur of the punitive damage award to $1 million. The Bank appealed.

The Bank's appeal was heard and decided by Justices Racanelli, Newsom and

Elkington[2/] of Division One of the First Appellate District of the State of California. They unanimously reversed the jury verdict on the ground of insufficient evidence. After the Court of Appeal issued its decision, Kruse filed petitions in the Court of Appeal for rehearing and requesting that Justices Racanelli and Newsom disqualify themselves. The petitions were denied on June 17, 1988.

Denied relief in the Court of Appeal, Kruse filed with the California Supreme Court two separate but related documents: (1) a Petition For Review of the Court of Appeal's decision, and (2) a Motion to Take Evidence Under Rule 23(b), California Rules of Court, seeking discovery and an evidentiary hearing on her claims that Justices Racanelli and Newsom should be disqualified on federal constitutional grounds. Kruse submitted voluminous briefs

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2/ Justice Elkington is deceased.

and evidentiary material in support of both the Petition and the Motion.

Both submissions raised the identical claims later made in appellant Kruse's Section 1983 Complaint -- that her federal constitutional rights had been violated because the Court of Appeal panel: (1) reversed her judgment on legal theories different from those upon which she had recovered; (2) failed to apply properly state appellate standards of review which required the Court to view the evidence in the light most favorable to the judgment, and (3) included justices who were disqualified for bias.

For example, in both cases, Kruse claimed that Justice Newsom had a long-standing relationship with the Bank through his family and the J. Paul Getty family, that the Bank had made loans to Justice Newsom to influence his decision in the *Kruse* case and a prior case, that the

Justices were former colleagues of Winslow Christian, a retired justice who became Director of Litigation for the Bank, and that the Justices may have been recommended by Mr. Christian for their positions.

On September 1, 1988, the California Supreme Court denied both the Petition For Review and the Motion To Take Evidence, stating,

> The requests to take further evidence are DENIED because petitioners have not made a prima facie showing of conflict of interest or bias, much less a deprivation of due process of law.
>
> The petitions for review are DENIED.

See Petitioners' Appendix F.

After unsuccessfully seeking a rehearing in the California Supreme Court, Kruse's attorneys petitioned this Court for a writ of certiorari, reciting -- and in some instances augmenting -- their charges against the Court of Appeal justices. Kruse argued, as she had to the California Supreme Court, that the due process clause

of the Fourteenth Amendment was violated by: (1) Justice Newsom's close legal, business and personal relationship to the Bank of America, (2) the participation of one biased justice on a panel of three, (3) the state Court of Appeal's reversal on legal theories and issues alleged to be different from those on which the case was tried and (4) the state Court of Appeal's failure to view the evidence and inferences in the light most favorable to the judgment. That Petition was denied.

B. The United States District Court Action: *Kruse v. Court of Appeal, et al.*

In early 1989, Kruse, again represented by Watson, filed a complaint under 42 U.S.C. § 1983, seeking injunctive and declaratory relief against the courts and the individual justices and over $400 million in damages against the non-judicial defendants.

The Complaint sought redress for the same alleged deprivations of constitutional rights that previously had been presented to, and ruled upon by, the California Supreme Court and presented to this Court. The only new matter included in the federal pleadings was a prodigious quantity of alleged "evidentiary" material and numerous conclusory assertions purporting to interpret that "evidence," all culminating in a charge that Justice Newsom had been bribed and blackmailed by, and conspired with, the Bank and its lawyers, to "fix" the *Kruse* appeal and earlier actions involving the Bank.

Each defendant (except the Sonoma County Superior Court) moved to dismiss plaintiff's claims pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), on two principal grounds: (1) that plaintiff's claims were barred by *res judicata* and collateral estoppel as a

result of the California Supreme Court's decision that appellant Kruse had not made out "a prima facie showing of conflict of interest or bias, much less a deprivation of due process of law;" and (2) that the District Court had no jurisdiction over Kruse's claims, pursuant to the *Rooker-Feldman* doctrine, because it would be required to review the merits of a state-court decision. The Court of Appeal and Justice Newsom requested that the District Court assess sanctions against Watson.[3/]

On August 14, 1989, the District Court granted defendants' dismissal motions from the bench, and on August 21, 1989, filed a written memorandum and order to the same

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3/ The Court of Appeal also moved to dismiss Kruse's claims as barred by the Eleventh Amendment to the United States Constitution, while the judicial defendants moved to dismiss Kruse's claims for injunctive relief because she had an adequate remedy at law and could make no showing of any threat of future injury. Justice Newsom also moved to strike or, in the alternative, to adjudicate summarily plaintiff's allegations of bribery, blackmail and conspiracy.

effect. *See* Petitioners' Appendix C. It later granted the judicial defendants' Rule 11 motions, stating that Watson would be required to pay the reasonable attorneys' fees and costs expended by the Court of Appeal, Justice Racanelli and Justice Newsom to oppose Kruse's Complaint and Watson's Rule 11 submission. *See* Petitioners' Appendix D. On August 22, 1990, after further briefing, the Court ordered Watson to pay a total of $206,475.70 in sanctions within 90 days. *See* Petitioners' Appendix E.

On October 24, 1991, the Court of Appeals for the Ninth Circuit affirmed the District Court's decision in all respects and awarded appellees double costs pursuant to 28 U.S.C. § 1912 and Rule 38 of the Federal Rules of Appellate Procedure. *See* Petitioners' Appendix A.

REASONS FOR DENYING THE PETITION

I. The Petition Does Not Raise An Important Issue of Federal Law.

A. The Decision That Federal Jurisdiction Was Barred By The *Rooker-Feldman* Doctrine Was Not Based On "Unsettled" Law But On Established Decisions Of This Court.

Petitioners argue that this Court should take the opportunity to define the "inextricably intertwined" language used in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), which they assert was improperly applied in Kruse's case by the District Court. According to Petitioners, the decision by the California state courts was not "inextricably intertwined" with their federal Section 1983 action because the state law tort claims tried in the state action were unrelated to the Section 1983 claims raised in the federal action. (Petition at 11-12.)

Petitioners attempt to manufacture an "important" issue of federal law where none

exists. Contrary to Petitioners' assertion, their argument does not involve an application of the "inextricably intertwined" concept of *Feldman*. This is because Petitioners' argument is based on a misrepresentation of the record below. They ignore the fact that the state courts did not just decide Kruse's state tort claims as they allege, but also decided the *very same* federal constitutional issues presented by Kruse's Section 1983 case.

When the California Supreme Court rendered its decision that "petitioners have not made a prima facie showing of conflict of interest or bias, much less a deprivation of due process of law" (*see* Petitioners' Appendix F), it was responding to the *same federal constitutional claims* later presented by Kruse in her federal court Section 1983 action. Those claims were that the Justices had (1) switched theories, (2) applied an improper standard

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of review, and (3) been biased in their decision due to the Bank's influence over Justice Newsom. Thus, contrary to Petitioners' argument, the issue raised in their Petition does not implicate *Feldman*'s "inextricably intertwined" rule. The issues presented in the state and federal actions were not different; they were the same.

Petitioners acknowledge that under *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415 (1923), where federal law questions "actually arose" and were decided by the state court, a federal district court has no jurisdiction, because a decision would amount to federal appellate review of the state court decision. The only avenue of review from the decision of the California Supreme Court was by Petition for Writ of Certiorari to this Court -- an avenue pursued and exhausted by Kruse.

Moreover, even if one accepted Petitioner's definition of "inextricably intertwined," this case falls squarely within that definition. In this case, in Petitioners' own words, "federal law was applicable to and had a controlling bearing upon, the decision to be made on the merits in the earlier state court action." (Petition at 10.) In the earlier state action, the California Supreme Court considered and decided Kruse's federal constitutional claims.

Finally, not only is Petitioner's "inextricably intertwined" argument based on an incomplete representation of the record, but it was not an argument made to the courts below. There, petitioners argued that *Rooker-Feldman* barred only the relitigation of state court decisions "on the merits," not decisions on "procedural" issues. For good reason, this argument apparently has been abandoned.

B. The Application Of *Res Judicata* Was Based On State Not Federal Law.

1. Only State Law Issues Are Involved.

Petitioners attempt to transform a decision based on the state law of *res judicata*, not ordinarily reviewable by this Court, into a federal legal issue. They try to bootstrap their claims that the District Court erroneously applied state *res judicata* principles on what constitutes a decision "on the merits" into a violation of 28 U.S.C. § 1738. But there is no issue of federal law here, only a dispute over the application of the California law of *res judicata*.

Section 1738 requires that federal courts give California state judicial proceedings "the same full faith and credit . . . as they have by law or usage" in the California courts. 28 U.S.C. § 1738. State law *res judicata* principles are to be applied by the federal courts to

determine the preclusive effect in federal court of state court decisions. *Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75, 81 (1984). There is no question that the federal District Court looked to California state law, not to federal or any other law, to determine the preclusive effect of the determinations made by the California state courts. *See* Petitioners' Appendix C. Thus, no violation of Section 1738 or *Migra* is presented, but only an issue as to the correct application of state law principles.

Only under exceptional circumstances does this Court grant certiorari to decide questions of state law. *See Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) ("standing alone, a challenge to state-law determinations by the Court of Appeals would rarely constitute an appropriate subject of this Court's review"); *Burks v.*

Lasker, 441 U.S. 471, 486 (1979) ("we did not grant certiorari to decide a question of state law"); *Pierson v. Ray*, 386 U.S. 547, 558 n.12 (1967) ("we do not ordinarily review the holding of the Court of Appeals on a matter of state law . . . ."). In this case, no exceptional circumstances warrant departure from this Court's usual practice.

2. The District Court Correctly Applied Established Principles of California Law.

Were this Court to review the state law issues considered by the lower courts, however, there is no important principle at issue. The District Court followed established California law in finding that the state courts had rendered a decision on the merits to be given preclusive effect. Moreover, the case arose out of a unique procedural posture that is unlikely to be repeated.

(i) The California Supreme Court Had Jurisdiction To Decide Kruse's Claim That The State Court Of Appeal Justices Should Be Disqualified For Bias.

Petitioners argue that the California Supreme Court's decision is not *res judicata*, because the Court declined to exercise its discretion to assume the jurisdiction required to render a decision on the merits. (Petition at 13-14.) To the contrary, the Court clearly had and exercised its jurisdiction.

Again, Petitioners ignore that Kruse did not merely file a Petition For Review of the Court of Appeal decision in her state lender liability case. She also filed with the California Supreme Court an independent, collateral proceeding for judicial disqualification. The California Supreme Court's jurisdiction to hear and decide an issue concerning disqualification of a justice of the Court of Appeal is

confirmed by *Kaufman v. Court of Appeal*, 31 Cal.3d 933, 184 Cal.Rptr. 302 (1982). *Kaufman* established that a disqualification claim against a Court of Appeal justice must first be made to the appellate judge in question and then, if the judge does not recuse himself or herself, by appeal to the California Supreme Court. In this case, the California Supreme Court ruled on Kruse's appeal when it held that she had not made a "prima facie showing of conflict of interest or bias, much less a deprivation of due process of law." *See* Petitioners' Appendix F.

Moreover, notwithstanding Petitioners' present argument that Kruse only filed a standard Petition For Review in the Supreme Court (Petition at 13-14), her position was to the contrary in the Supreme Court. In a supplemental letter to her Petition for Review, Kruse told the Court:

> [T]he question of violation of the federal constitutional rights of

> Plaintiff arose for the first time in the Court of Appeal, from the conduct of that Court, in allegedly depriving Mrs. Kruse of her property (i.e., her $4 million judgment) without the due process of law and equal protection guaranteed under the Fourteenth Amendment. Thus, this Court is the sole and only California State Court of competent jurisdiction to review those federal constitutional claims, and vacate the Court of Appeal decision, if those claims are determined to be well-founded.

Kruse was correct: her collateral attack on the Court of Appeal decision gave rise to a whole new case. Under *Kaufman*, first the California Court of Appeal and thereafter the California Supreme Court had jurisdiction to hear her request for disqualification.

(ii) The California Supreme Court's Determination Was An Adjudication On The Merits.

Under *Kaufman*, the bias claim arose and was first considered in the Court of Appeal. As Kruse has admitted, her only avenue of appeal from the Court of Appeal's decision on that claim was to the

California Supreme Court. Where "[t]he sole means provided by law for judicial review" is to the Supreme Court, a "petition . . . for writ of review . . . serves in effect the office of an appeal." *Consumers Lobby Against Monopolies v. Public Utilities Commission*, 25 Cal.3d 891, 901, 160 Cal.Rptr. 124, 129 (1979) ("*CLAM v. PUC*"). In such a case, a "denial of a petition for writ of review is 'a decision on the merits both as to the law and the facts presented in the review proceedings.'" *Id.*

Petitioners argue that denial of a Petition For Review to the California Supreme Court is never on the merits. But that position was expressly rejected (long ago) by this Court in *Napa Valley Electric Co. v. Board of Railroad Commissioners*, 251 U.S. 366 (1920). In *Napa Valley*, the Supreme Court of California had refused, without written decision, to issue a writ

annulling orders of the Railroad Commission. The plaintiff then sought to enjoin enforcement of the Commission's orders in federal District Court, which dismissed the proceedings on the ground the Supreme Court's action was *res judicata*. On appeal to this Court the plaintiff argued that since no writ had been issued, the California Supreme Court "instead of hearing refused to hear, instead of adjudicating refused to adjudicate, and that from this negation of action or decision there cannot be an assertion of action or decision with the estopping force of res judicata." *Id.* at 371. This Court rejected this contention, holding that "the denial of the petition was necessarily a final judicial determination, based on the identical rights" and that "[s]uch a determination is as effectual as an estoppel as would have been a formal judgment." *Id.* at 372-373.

The rule set forth in *CLAM v. PUC* and *Napa Valley* has been acknowledged in numerous other cases.[4/] None require the formalities that appellants argue are essential to a decision on the merits: *i.e.*, grant of the Petition For Review, oral argument attended by four justices, a decision in writing with reasons stated, or publication of a written decision in the official reports. *See Napa Valley Electric*

4/ *Geibel v. State Bar*, 14 Cal.2d 144, 93 P.2d 97 (1939) (denial of a petition which attacked the qualification of a Board of Governors' member on grounds of conflict of interest was *res judicata* on the issue of disqualification); *Funeral Directors Association v. Board of Funeral Directors*, 22 Cal.2d 104, 107-08, 136 P.2d 785, 787 (1943) (confirming that *Napa Valley* and *Geibel* were instances where "this court was the sole tribunal available in the premises, and our denial of the earlier petition necessarily included a determination of the merits thereof"); *Union City v. Southern Pacific Co.*, 261 Cal.App.2d 277, 279, 67 Cal.Rptr. 816, 818 (1968) (denial of petition for review from PUC decision was a "ruling on the merits" even though "without opinion"); *Pacific Telephone & Telegraph Co. v. P.U.C.*, 600 F.2d 1309, 1311-14 (9th Cir.), *cert. denied*, 444 U.S. 920 (1979) (acknowledging the continued vitality of *Napa Valley*).

Co., 251 U.S. at 371 (irrelevant that no writ had issued, no appearance made by the parties and no hearing held on a certified record).[5/]

Finally, even if, as Petitioners argue, Kruse filed only a standard Petition For Review in the Supreme Court, the Court's denial of that Petition is still "on the merits" because it unequivocally reached the merits of Kruse's disqualification claims. As the California Supreme Court previously has stated:

> The rule is well settled that a denial by this or the appellate court of an application for a writ without opinion "is not res judicata of the legal issues presented by the application unless the sole possible ground of the denial was that the court acted on the merits, or *unless it*

5/ The September 19, 1988 letter from the Office of the Clerk of the Supreme Court (*see* Petitioners' Appendix G), does not change this result. The letter from the Clerk is not a decision of the Supreme Court. Moreover, it addresses only the rules for rehearing. It does not address the *res judicata* effect of a denial of a petition when an appeal to the Supreme Court is the sole avenue of review.

> *affirmatively appears that such denial was intended to be on the merits.*"

Hagan v. Superior Court, 57 Cal.2d 767, 770, 22 Cal.Rptr. 206, 208 (1962) (emphasis added) (citations omitted).[6/]

(iii) The United States Supreme Court Authority Cited By Petitioners Does Not Control State Law On *Res Judicata*.

Petitioners rely on a series of United States Supreme Court cases (all addressing the Court's jurisdiction to conduct

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6/ *See also CLAM v. PUC*, 25 Cal.3d at 901 n.3. This principle has been applied by the Ninth Circuit and the California appellate courts. *See Nakash v. Marciano*, 882 F.2d 1411, 1414-15 (9th Cir. 1989) ("when a court denies or grants an extraordinary writ with a written opinion, that decision has 'ordinary res judicata effect'" (citations omitted)); *No Slo Transit, Inc. v. City of Long Beach*, 197 Cal.App.3d 241, 260-61, 242 Cal.Rptr. 760, 771 (1987) (denial of a writ of mandate to compel discovery "was intended to be a decision on the merits with its unequivocal suggestion to appellants as to how they might further proceed"); *Richer v. Superior Court*, 63 Cal.App.3d 748, 756, 134 Cal.Rptr. 52, 56 (1976) (denial of petition for writ of prohibition with a "statement of the reasons" was on the merits and thus became law of the case.)

certiorari review under 28 U.S.C. § 1257) to argue that a denial of review by the California Supreme Court, even if reasons are given, is not a decision on the merits. That reliance is misplaced for two reasons.

First, the decisions cited by Petitioners neither address the issue of *res judicata*, nor purport to determine California law on when a decision of the California Supreme Court is on the merits. Rather, they consider only the *federal* question of the Supreme Court's jurisdiction under 28 U.S.C. § 1257. Those Supreme Court cases that directly address the *res judicata* effect of a decision of a state court, squarely hold that it is a question of state, not federal law. *See, e.g., Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. at 81.

Second, even assuming that Petitioners' cases are relevant to the *res judicata* issue, they support Respondents, not

Petitioners. In *American Railway Express Company v. Levee*, 263 U.S. 19, 20 (1923), the Court recognized, as it did in its *res judicata* decisions, that whether a state appellate court has reached the merits of a case is determined by state practice and procedure; the Court relied on the Louisiana State Constitution to determine that the State Supreme Court had declined to exercise jurisdiction. Similarly, in *Norfolk & Suburban Turnpike Co. v. Commonwealth of Virginia*, 225 U.S. 264, 269 (1912), the Supreme Court merely declared a rule of convenience for itself in avoiding confusion over which state appellate court had rendered the final decision subject to review by the Supreme Court. The Court determined "for the guidance of suitors in the future" to look to the face of the record for "an affirmance in express terms of the judgment or decree sought to be reviewed . . . ." *Id.* at 269. This rule

of convenience was apparently applied in *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 160-61 (1954), which cited the *Norfolk* case. Thus, these cases explore only the issue of the proper state court from which an appeal should be taken. They say nothing about California law on *res judicata*.

3. Reconsideration of *Pulliam v. Allen* Is Not Properly Raised By Petitioners, And In Any Event, Has No Bearing On These Respondents.

In a curious argument, Petitioners ask this Court to reconsider *Pulliam v. Allen*, 466 U.S. 522 (1984) and decide whether there is complete judicial immunity in this action, not just against claims for damages, but also against claims for injunctive relief. Their motivation for making this argument is unclear. It does not benefit them, but the judicial Respondents. Petitioners in fact urge this Court to "affirm the dismissal of the state

Justices and Courts on the basis of judicial immunity." (Petition at 23.)

Apparently Petitioners believe that by urging dismissal of the judicial Respondents, they will make their claims against the nonjudicial Respondents more palatable to the Court. Although there is nothing in the record to support their assertion (*see* Petitioners' Appendix C), they speculate that the District Court dismissed this action based on *res judicata* and *Rooker-Feldman* "to avoid following *Pulliam*, and to confer judicial immunity against equitable relief by indirect means." (Petition at 7-9.) They seem to fear that this Court will deny their Petition for the same reasons.

If Petitioners believe, as they argue, that the judicial Respondents have absolute immunity, they should simply dismiss them. In fact, based on their request that the judicial Respondents be dismissed, they may

be judicially estopped from further prosecution of claims against those Respondents. Moreover, Petitioners have no standing to make the argument, because they can claim no benefit (except a speculative and questionable tactical benefit) from a decision expanding *Pulliam*.

In any event, this Court should reject Petitioner's argument. The application of *Pulliam v. Allen* to the judicial Respondents has no effect on the case against these non-judicial Respondents. The doctrines of *res judicata* and *Rooker-Feldman* have the same force and effect whether or not the judicial Respondents are dismissed. As demonstrated above, those doctrines create an absolute bar to prosecution of Kruse's Section 1983 claims against all Respondents.

CONCLUSION

For the foregoing reasons, the Bank Respondents request that the Petition be denied.

DATED: April 9, 1992

Respectfully submitted,

JEROME I. BRAUN
LINDA M. ROSS
FARELLA, BRAUN & MARTEL

Attorneys for Respondents Winslow Christian; Bank Of America National Trust & Savings Association; Leland Parachini, Steinberg, Flinn, Matzger & Melnick; And David B. Flinn

MICHAEL J. HALLORAN
KRISTIAN D. WHITTEN
BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION

Attorneys for Respondent Bank Of America National Trust & Savings Association

BY: JEROME I. BRAUN

(3)

No. 91-1536

Supreme Court, U.S.
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MAY 11 1992
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1991

IRENE O'CONNELL KRUSE
AND
FREDERICK E. WATSON,
Petitioners,

vs.

COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, WILLIAM A. NEWSOM; JOHN T. RACANELLI, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES AS MEMBERS OF DIVISION ONE OF THE SAID COURT OF APPEAL; SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SONOMA; WINSLOW CHRISTIAN; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; LELAND PARACHINI, STEINBERG, FLINN, MATZGER & MELNICK; DAVID B. FLINN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION

FREDERICK E. WATSON
1475 N. Broadway
Suite 390
Walnut Creek, CA 94596
(510) 947-0393
Petitioner in Pro Se

FREDERICK E. WATSON
1475 N. Broadway
Suite 390
Walnut Creek, CA 94596
(510) 947-0393
Counsel of Record

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Petitioner in Pro Se

FREDERICK E. WATSON
1475 N. Broadway
Suite 390
Walnut Creek, CA 94596
(510) 947-0393
Counsel of Record

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Rule 15.7 provides a Supplemental Brief may be filed calling attention to intervening matters not available at the time of the last filing. Implicit in the rule of course, is the requirement that the intervening matter be relevant and material to the questions raised in the Petition. The intervening matter to which attention is called herein, and the relevance and materiality of same, can be summarized as follows:

Petitioners' petition was filed March 11, 1992. The principal reason relied upon for granting the writ was Petitioners' contention that the record discloses that the Court of Appeals, acting through a panel which included the Honorable John T. Noonan, so far departed from the accepted and usual course of judicial proceedings in this *Kruse* case, as to call for the exercise of this Court's power of supervision. Further, that said panel of the Court of Appeals sanctioned just such a previous departure from the accepted and usual course of judicial proceedings, by the District Court acting through the Honorable Marilyn Hall Patel, and for this additional reason, exercise of this Court's power of supervision is called for in this *Kruse* case.

Thus, any intervening events or matters tending to prove and establish that there was such departure from the accepted and usual course of judicial proceedings in the present *Kruse* case, are properly brought to the attention of this Court.

Accordingly, this Supplemental Brief discusses the subsequent actions and conduct, in April, 1992, of the same District Judge Patel in issuing a stay of execution of convicted murderer Robert Harris, and the actions and conduct of the same Circuit Judge Noonan, in voting for the Ninth Circuit's issuance of stays of execution of Harris; as well as Judge Noonan's publication in the April 28, 1992 edition of the New York Times, of an article in which he strongly criticized this Court's vacating of the Ninth Circuit's stays of execution of Harris, and enjoining the lower courts from issuing any further stays without permission of this Court.(App. J pp.1-2)[1] Judge Noonan's article asserted that the judicial action of this Court improperly forced the lower courts to "commit 'treason to the Constitution' and abstain from

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[1] Attached to this Supplemental Brief is a Supplemental Appendix, which commences with Appendix J, since the last Appendix to the Petition was Appendix I.

exercising...jurisdiction...to delay an execution to decide a constitutional question." By this accusation, Judge Noonan implied, we submit, that this Court itself violated the Constitution.

We suggest that the said actions and conduct of Judge Patel and Judge Noonan are intervening events which, when properly analyzed, conclusively demonstrate that the District Court and the Court of Appeals departed from the accepted and usual course of judicial proceedings in almost identical fashion in the *Harris* case and in the present *Kruse*; so that just as this Court found it necessary and proper to exercise its power of supervision to correct error in the *Harris* case, so likewise is there compelling need and justification for exercise of that power of supervision to correct error in the present case.

This is so because, as we shall show, it appears that in both the *Harris* case and the present *Kruse* case, Judge Patel and Judge Noonan and his colleagues on the Court of Appeals who voted with him in the *Harris* and *Kruse* cases; took the position that they were not bound to follow the rule of law and decisions of this Court, but rather were free to consult their own judicial conscience and decide any case or matter in such manner as to reach what they personally were convinced was the morally correct and desirable result, even if that meant disregarding the established rule of law and decisions of this Court.

Further, we respectfully submit that it appears that the said jurists believed that the end justified the means to such extent that they found it expedient to resort to sophistic arguments in the *Harris* case; and in the present case, to adopt erroneous rules of law and even outright fictions of law, to reach what they believed to be the morally correct and desirable result. We submit that rendition of Circuit Court of Appeals decisions, pursuant to this judicial philosophy, would, if allowed to go unchecked, reduce this Court from a position of being a Supreme Court of last resort -- which is entitled to make the ultimate ruling as to what is the morally and legally correct decision to be reached on any given federal question -- to a position of being merely one among equals with the Circuit Courts of Appeals.

II. THE INTERVENING EVENTS IN THE *HARRIS* CASE DEMONSTRATE THAT JUDGE PATEL AND JUDGE NOONAN FEEL FREE TO RULE ACCORDING TO THEIR OWN JUDICIAL CONSCIENCE AND CONTRARY TO THE RULE OF LAW AND DECISIONS OF THIS COURT

Judge Noonan stated in his New York Times article, that the civil rights action filed in District Court challenging execution by cyanide gas as being cruel and unusual punishment, was filed as a class action, and therefore, Judge Patel's order staying all executions in California by cyanide gas, pending a hearing on the constitutional issue, was a stay order which only incidentally stayed Harris' execution, because Harris was "only one of 323 death-row inmates in California on whose behalf the civil-rights action was brought." (App. J pp. 1-3)

Judge Noonan then noted in his article that the State of California did not agree that Harris was merely an incidental beneficiary of the class action suit and Judge Patel's stay order because:

> "The state, anxious for him to meet his date with death, claimed that the case was really 'a Harris case,' unfairly brought at the last moment to throw his execution off track." (App. J pp. 1-3).

Judge Noonan then argued in his article that the issue thus presented was whether constitutional rights, such as protection against cruel and unusual punishment "are to be suspended or set aside to assure the orderly keeping of an execution date" (App. J pp. 1-3).

We respectfully submit that this statement of the issue completely begs the question. The question is not whether constitutional rights should be suspended or set aside to assure orderly keeping of an execution date; rather, the question is whether appeals in death penalty cases, raising claims of error or constitutional issues long known to counsel for appellant; can properly be deliberately withheld from inclusion in prior appeals, and then later filed as a separate piecemeal appeal at the eleventh hour, to obtain stay of execution. Further, whether the answer to this question is any different if such a last minute appeal is disguised in the form of a class action, raising a constitutional issue which has long been known to counsel filing the action, but filing

of which class action is deliberately withheld until shortly before a scheduled execution, to thus obtain yet another last minute stay of execution.

We further submit that Judge Patel and Judge Noonan were well aware that several weeks before Judge Patel issued her stay of all executions, on April 18, 1992; this Court had directed the Ninth Circuit to proceed with all deliberate speed to complete and dispose of an appeal in a death penalty case which arose in the State of Washington, and (if we have an accurate recollection of the newspaper article describing this Court's order in that case) suggesting that this Court might have to assign that appeal to another Court, if the Ninth Circuit did not proceed to dispose of that appeal within a reasonable time. Therefore, we suggest that Judge Patel's issuance of stay pending decision on a constitutional question long known, and the Ninth Circuit's later issuance of stay for that same purpose, constituted refusal to follow this Court's prior direction to proceed with reasonable diligence to dispose of death penalty appeals.

This is demonstrated, we submit, by Judge Noonan's own article, in which he notes that the controversy over whether execution by cyanide gas is cruel and unusual punishment, is not a controversy or issue which arose for the first time at the unusual Saturday night hearing held by Judge Patel on April 18, 1992, but rather is a controversy and issue long known, which has resulted in all but three states that have capital punishment, abandoning use of cyanide gas, in favor of other methods of execution (App J pp. 1-3). Thus, the reasonable inference to be drawn is the one on which the State based its argument, and which inference and argument were apparently accepted by this Court; namely, that the filing of the class action was a contrived means of obtaining a last minute stay of execution from judges who are personally opposed to the death penalty on moral grounds and therefore do not feel bound to follow the rule of law or decisions or orders of this Court, where the result of doing so would be to permit executions to go forward.

We submit that the conclusive proof of this lies in Judge Noonan's article, which contains his express accusation that this Court forced the lower courts to commit treason to the Constitution, and his implied accusation that by so acting, this Court itself violated the Constitution. Those accusations could only be made, we submit, by a jurist who is convinced that his or her first and highest allegiance is to his or her own moral and judicial conscience, and that when morally convinced that a certain result should be reached in a given case or matter; that he or she is then free to rule in that manner, even though this involves refusing to follow the rule of law and decisions of this Court.

The record provides further confirmation that Judge Patel believes that her first and primary allegiance is to her own moral and judicial conscience, and that she is to be guided in her rulings and decisions by her own moral conscience, even if this means refusing to follow the rule of law, and the decisions or orders of a higher court. Thus, the record discloses that Judge Patel presided in *United States of America v. Felix W. Mitchell*, Northern District of California criminal action CR-83-0130-MHP in which "druglord" Mitchell was convicted and sentenced to prison by Judge Patel. Mitchell appealed to the Ninth Circuit, where his appeal was assigned No. 85-1169, and Mitchell then died before his appeal could be heard and decided. Citing and relying upon the long-settled law laid down by this Court in *United States v. Daniels*, 47 U.S. (How.) 11, 13; 14 L.Ed 323 (1848), holding that vacation of the judgment of conviction and dismissal of the indictment is required when a defendant-appellant dies pending appeal; the Ninth Circuit entered its order providing that:

> "The matter is remanded to the district court with instructions to vacate the judgment of conviction and to dismiss the indictment as to defendant Felix Wayne Mitchell, Jr."

Upon the remand going down, Judge Patel held a hearing at which she publicly announced that she would not obey the Ninth Circuit's order because that higher Court's order "clearly conflicts with my moral and ethical conscience."

Judge Patel then entered an order on August 14, 1987 in which she stated:

> "For the reasons stated during the above-mentioned hearing, this Court recuses itself from any further proceedings in the case against Felix Wayne Mitchell, Jr.
>
> This matter is referred to Robert F. Peckham, Chief Judge under the Assignment Plan for this Court, for reassignment."

III. THE FOREGOING DISCUSSION CONFIRMS THAT JUDGE PATEL AND THE NINTH CIRCUIT PANEL, INCLUDING JUDGE NOONAN, DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN THE PRESENT KRUSE CASE

We submit that the foregoing discussion confirms that Judge Patel and the Ninth Circuit panel, which included Judge Noonan, so far departed from the accepted and usual course of judicial proceedings in the present *Kruse* case as to call for an exercise of this Court's power of supervision. That is, Petitioners contend in their Brief In Support Of Petition and in their Brief In Reply To Opposition, that the record clearly demonstrates that the District Court refused to follow this Court's decisions in *Pulliam v. Allen*, 466 U.S. 522; 80 L.Ed. 565 (1984) and *Dennis v. Sparks*, 449 U.S. 24; 66 L.Ed.2d 185 (1980) and granted judicial immunity against injunctive relief to the state jurists (contra *Pulliam*) and granted derivative immunity to private party defendants (contra *Dennis*).

Further, that District Judge Patel did not do this directly, but rather did so indirectly, by adopting fictions of California law to sustain specious affirmative defenses of res judicata and Rooker-Feldman and then dismiss the §1983 action on that improper basis. Finally, that Judge Patel did that to reach what she perceived to be the morally correct and just result of protecting judicial independence, and the reputation of the judiciary, even though the unlawful dismissal of the action constituted an improper refusal to exercise §1983 jurisdiction; and resultant denial of Mrs. Kruse's right to seek to recover damages against the private party defendants for their alleged corruption of justice and violation of her federal constitutional rights.

In addition, petitioners contend in their Brief In Support Of Petition and Brief In Reply To Opposition, that the record is equally clear in its demonstration that the Court of Appeals affirmed the District Court's decision "for the reasons stated by the trial judge" and thus sanctioned the District Court's said complete departure from the accepted and usual course of judicial proceedings. Petitioners contend the record discloses this was done to reach what the Court of Appeals Judges were also convinced was the morally correct and desired result to be reached in this case, even though this involved refusal to follow decisions of this Court, and denial of procedural due process to the litigants. Moreover, that the Court of Appeals aggravated the injustice by its own denial of due process, by imposing sanctions for a frivolous appeal, over objection that it was violative of due process to impose such sanctions without first designating which arguments were

supposedly so lacking in merit as to be frivolous, and then giving an opportunity for filing a brief in opposition to sanctions on appeal.

Finally, the record discloses still further refusal by the Court of Appeals to follow decisions of this Court, and to instead reach the result which it desired to reach. Under the rule announced by this Court in *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 249-250; 88 L.Ed. 1250 (1943) and *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580; 90 L.Ed. 1447 (1945) the Court of Appeals had both the authority and the duty to investigate any suggestion made to that Court and supported by facts giving substance to the suggestion, that that Court has been imposed upon and caused to render its decision by fraud perpetrated upon the Court by an opposing party and/or counsel.

In January, 1992, petitioners filed motions with the Court of Appeals requesting investigation of fraud upon the Court by Defendant/Respondent State Court of Appeal Justice Newsom and his legal counsel, supported by a showing of facts which were already known to the Court of Appeals from the record, and citation and discussion of law newly discovered in additional research by Petitioners:

The record reflects that counsel for Justice Newsom were paid over $224,000 by the State for providing a defense to Justice Newsom, by rendition of services which consisted of nothing more than handling his motion to dismiss the action and his motion for sanctions. Further, that the declaration of his counsel indicated that they had forwarded all billings to Justice Newsom, who in turn had presented those billings to a State official who had approved payment of State monies directly to his legal counsel. It appeared that counsel for Justice Newsom had therefore not entered into a contract with the State, to be employed by the State to render the defense to Justice Newsom.

By contrast, declarations filed by counsel for Justice Racanelli disclosed that his counsel had entered into a contract with the State, which limited the amount of fees to be paid, to reasonable fees for services reasonably required, and counsel for Justice Racanelli received $25,000 payment for rendition of the same services as were rendered for Justice Newsom.

As the Court of Appeals was also aware, petitioners strongly objected to Justice Newsom's counsel's request for award of sanctions in the amount of attorney's fees and costs of over $224,000 that had been paid by the State. That objection was made

on the ground that counsel had assembled a team of 22 lawyers, law clerks and paralegals to inflate the fees for the purpose of having huge sanctions imposed. The District Judge agreed that the case had been overstaffed, work had been duplicated, and the fees were therefore excessive, but then only reduced the request by $58,000, and awarded sanctions of $166,000 to Justice Newsom's legal counsel, because of their insistence that all of the fees and costs were reasonable, or the State would not have paid the same. (App. E pp. 37-38)

Petitioners cited to the Court of Appeals, newly discovered law that it is unlawful and illegal for the State to make payment to private counsel to defend a State official, unless the private counsel have first entered into a standard written contract of employment, which limits and restricts payment of fees and costs to reasonable fees and costs. Further, that it is a crime under California Penal Code §72 for anyone to present a false claim for payment to the State, with intention to defraud, and that at least as to the $58,000 which the District Judge found was excessive and unreasonable, that amount of payment by the State had been fraudulently obtained.

When this suggestion of fraud upon the Court was made to the Court with copies to opposing counsel, counsel for Justice Newsom did not present any evidence that they had in fact entered into a contract as required, and thus tacitly admitted that all payments received by them were illegally received and illegally held, and subject to being recovered by the State in their entirety, since the law is that under such circumstances, private counsel are not entitled to even quantum meruit compensation.

It was further suggested to the Court of Appeals that under these circumstances, it appeared to be proven that Justice Newsom had conspired with his legal counsel, to illegally and even fraudulently obtain payment from the State, of grossly inflated attorney's fees and costs, so that those could then be recovered as a fraudulently induced award of sanctions.

Despite this suggestion supported by the said facts and law, the Court of Appeal declined and refused to investigate fraud upon the Court and resultant grave miscarriage of justice in the Court of Appeals decision.

Dated: May 11, 1992

Respectfully submitted,

FREDERICK E. WATSON
1475 N. Broadway, Suite 390
Walnut Creek, CA 94596
(510) 947-0393
Petitioner in Pro Se

FREDERICK E. WATSON
1475 N. Broadway, Suite 390
Walnut Creek, CA 94596
(510) 947-0393
Counsel of Record

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Should Executions Run On Schedule?

BY JOHN T. NOONAN

SAN FRANCISCO - "Treason to the Constitution" is a strong charge. It was the phrase employed in 1921 in argument before Chief Justice John Marshall to describe a federal court's failure to exercise its jurisdiction in a case properly brought before it.

On Saturday evening, April 18, a courageous federal judge, Marilyn Hall Patel, refused to commit treason to the Constitution and in a suit brought under the Civil Rights Act, ordered a hearing on whether death by cyanide gas was cruel and unusual punishment prohibited by the Constitution.

Her order also affected the execution of Robert Alton Harris, the condemned murderer scheduled to die on April 21.

Not even the most doctrinaire "original intent" jurist maintains that the determination is to be made as of 1791, when the Bill of Rights became part of the Constitution.

Since *Weems vs. United States* in 1909 we have been committed to an evolving standard of human decency.

Second, a good index of what is cruel and unusual is what the state legislatures allow.

In 1992 just three states authorize cyanide gas as the only means of inflicting capital punishment.

One, Arizona, is in the process of abandoning the method and another, Maryland, has not had an execution since 1961.

It is a serious question whether the consensus of all the other legislatures shows that California's means of carrying out the death penalty violates the constitutional norm.

Third, any "unnecessary suffering" in imposing the death penalty is forbidden by the Constitution.

The Constitution permits capital punishment; it does not permit torture.

Judge Patel was presented Saturday night with a mass of affidavits asserting that the use of the gas chamber did lead to a tortured death.

It is an important question whether this evidence could be rebutted.

Concluding as a matter of common sense that these questions could not be answered on a Saturday night, Judge Patel set a hearing to be held in 10 days where testimony could be taken and the arguments, pro and con, fully explored.

Pending the hearing, she prohibited the use of lethal gas to execute anyone.

The immediate beneficiary was Harris.

He was only one of 323 death-row inmates in California on whose behalf the civil-rights action was brought.

The state, anxious for him to meet his date with death, claimed that the case was really "a Harris case," unfairly brought at the last moment to throw his execution off track.

The state's contention brought into focus an issue now before the country -- not the death penalty itself, but whether the precedents, built up over this century for guarding everyone's civil rights, are to be suspended or set aside to assure the orderly keeping of an execution date.

About 3 a.m. on Tuesday the U.S. Supreme Court decided that the Harris execution must stay on track.

Federal courts must no longer exercise their jurisdiction in ways that would derail it.

Profound ambivalence had existed.

We are a country with a Constitution and a Bill of Rights, which we celebrate and cherish and which the courts enforce.

We are a country with a Civil Rights Act that no one wants to appeal.

But we are also a country where some states by vote have determined that atrocious crimes may be punished by death.

Prompt enforcement of that penalty conflicts with the precedents built up under the Constitution, Bill of Rights and Civil Rights Act.

If death penalties are to be inflicted according to a state's schedule, these protections must give way.

So, at least, is the present position of the U.S. Supreme Court, Justices Harry A. Blackmun and John Paul Stevens dissenting.

That court has resolved the national ambivalence and decided that it is intolerable for a federal court to delay an execution to decide a constitutional question.

Harris was a casualty of this decision. Was the Constitution, too?

John T. Noonan is a judge of the U.S. Court of Appeals for the Ninth Circuit. From the New York Times.